Supreme Court, U.S.
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No. _____
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IN THE

Supreme Court of the United States

MICHAEL HALL,
Petitioner,

v.

RICK THALER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 30, 2010

CAPITAL CASE

QUESTIONS PRESENTED

Petitioner was sentenced to death in Texas state court despite the fact that even the state's expert refused to opine that Petitioner was not mentally retarded. The federal district court then denied Petitioner's request for habeas relief, but the Fifth Circuit vacated and required the district court to hold an evidentiary hearing. At the hearing, the State's expert opined that Petitioner, who scored a 67 on an IQ test administered at the time of his trial, and who exhibited substantial adaptive deficiencies, was not mentally retarded. That opinion was based on the belief that Petitioner's limitations were at least in part due to environmental factors, such as Petitioner's troubled home life. The district court credited this testimony, as well as lay testimony from prison officials that Petitioner was "normal," and dismissed the habeas petition. The Fifth Circuit denied a certificate of appealability.

This Petition presents the following questions:

1. Whether a sub-70 IQ and substantial adaptive limitations that satisfy the clinical definition of mental retardation nevertheless fail to bring a defendant within the scope of *Atkins v. Virginia*, which bars execution of the mentally retarded, where those limitations may have been caused, even in part, by "environmental" factors.

2. Whether Texas's approach to assessing adaptive limitations violates *Atkins* by departing from clinical standards.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

Michael Hall was the appellant below.

Rick Thaler, director of the Texas Department of Criminal Justice, Correctional Institutes Division, was the appellee below.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, reported at 597 F.3d 746 (5th Cir. 2010), is reprinted at Pet. App. 1a. The decision of the United States District Court for the Northern District of Texas is reprinted at Pet. App. 4a.

JURISDICTION

The Court of Appeals' judgment was entered on February 22, 2010. A timely petition for rehearing and rehearing *en banc* was denied on April 1, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. Texas's Implementation of the *Atkins v. Virginia* Framework

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits as cruel and unusual the execution of persons who are mentally retarded. *See id.* at 321. Such punishment is excessive both because the mentally retarded are less able to assist counsel in their defense at trial and because they are less morally culpable due to their diminished capacity for moral and logical reasoning and impulse control. *Id.* at 320-21; *see also id.* at 310, 313-17 (pointing to a "dramatic shift in the state legislative landscape," given the large number of states that had recently prohibited such executions).

Although the Court left to the states "the task of developing appropriate ways to enforce" the constitutional protections, it explained that existing "statutory definitions of mental retardation... generally conform to" two similar clinical definitions of mental retardation from the American Psychiatric Association ("APA") and the American Association on Mental Retardation ("AAMR"). *Id.* at 317 & n.22 (internal quotation marks omitted). The APA definition cited in *Atkins* defines mental retardation as: (1) "significantly subaverage general intellectual functioning," (2) "accompanied by significant limitations in adaptive functioning in at least two of [eleven] skill areas,"[1] and (3) "onset ... before age

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[1] Those areas are "communication, self care, home living, social/interpersonal skills, use of community resources, self-

18." *Id.* at 308 n.3 (internal quotation marks omitted). The AAMR definition cited in *Atkins* is essentially identical, except that it combines two of the adaptive skill areas into one, for a total of ten.[2] *Id.* The Court thus defined mental retardation in clinical terms based on the consensus among the states to use a clinical definition.

Texas was one of the few states that still executed the mentally retarded at the time of *Atkins*, *id.* at 316 n.20, and Texas still has not enacted a statute to guarantee the protections *Atkins* describes. In *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), however, the Texas Court of Criminal Appeals defined mental retardation under Texas law for the purpose of assessing *Atkins* claims. The *Briseno* court stated that it would "follow the AAMR ... criteria," but characterized the adaptive functioning criteria under that definition as "exceedingly

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direction, functional academic skills, work, leisure, health, and safety." *Id.* at 308 n.3.

[2] The AAMR has since changed its name to the American Association on Intellectual and Developmental Disabilities ("AAID"). *See* Am. Ass'n on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010) ("*AAIDD 2010 Definition*"). The current AAIDD definition of mental retardation differs from the pre-2002 AAMR definition referenced in *Atkins* in two minor ways. First, the AAIDD definition uses the term "intellectual disability" rather than "mental retardation," though the term intellectual disability "covers the same population of individuals who were diagnosed previously with mental retardation." *Id.* at 12. Second, it assesses adaptive deficiencies, requiring only one limitation in three broad adaptive skill categories (conceptual, social, and practical), rather than two of ten. *Id.* at 1.

subjective," forecasting that experts would "undoubtedly ... be found to offer opinions on both sides of the issue in most cases." *Id.* at 8. The court therefore described "other evidentiary factors" that factfinders should weigh, listing seven questions such as "Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?" and "Does his conduct show leadership or does it show that he is led around by others?" *Id.* Finally, *Briseno* cautioned that while "experts may offer insightful opinions" on whether a person meets clinical criteria, "the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact." *Id.* at 9.

B. Criminal Trial

Hall was convicted of capital murder in Texas in 2000, two years prior to this Court's decision in *Atkins v. Virginia*. He and another defendant were found guilty for the murder of Hall's co-worker. Hall was eighteen years old at the time of the crime. Because Texas did not bar the execution of the mentally retarded, the jury considered evidence that Hall was mentally retarded only in connection with a mitigation special issue during the sentencing phase of trial.[3] Pet. App. at 230a-31a.

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[3] That statutorily mandated special issue asks the broad question "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the

The expert witness for the defense, Dr. Cunningham, stated unequivocally that Hall was mildly mentally retarded. He based his conclusion on the fact that Hall's IQ was measured at 67, and that he exhibited adaptive functioning deficits in several respects. *Id.* at 213a-15a. The state's expert, Dr. Price, declined to opine whether Hall was mentally retarded. Instead, he testified that Hall was either mildly mentally retarded or borderline and that it was a clinical "judgment call." *Id.* at 216a.

Hall also presented substantial testimony from family members and teachers.[4] *Id.* at 23a-41a. His mother testified that as a teenager Hall "did not fit in with people his age. He played as if he were eight years of age, and attracted kids eight, nine, or ten years old." *Id.* at 25a. She said "children his own age would call him stupid or retarded, which would cause Hall to cry. Younger children accepted him." *Id.* Hall's older brother testified that Hall could not read an analog clock. *Id.* at 29a.

Cheryl Conner, Hall's high school reading, English, and math teacher, who "probably knew more about him than any other school employee," testified that he read at the first-grade level, and

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Defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment [without parole] rather than a death sentence be imposed." Pet. App. 172a-73a; *see also* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e)(1).

[4] Quotations in the section are taken from the federal district court's recounting of the testimony.

that he was incapable of remembering the second step of a two-step instruction. *Id.* at 34a. In class, she would "check[] his progress every five minutes to keep him on task; otherwise, he would drift off, either begin to sleep or stare." *Id.* She noted that although "Hall was susceptible to being manipulated by other students," he would "attempt[] to conceal his shortcomings by bragging and boasting. It sounded as if he was repeating things that he had heard previously." *Id.* at 35a. She said that "[m]ost of the time when he would try to interact, the things he would say were so bizarre that the other students became upset, and perhaps even angry, but after awhile they just ignored him." *Id.*

These witnesses also spoke to Hall's traumatic home life. Hall lived in twelve different places before his eighteenth birthday. His mother had numerous sexual partners over to their home, which was also the scene of violence and drug abuse. Hall witnessed one of his mother's boyfriends attempt to commit suicide. *See id.* at 23a-24a. Hall's brother left the home after his mother's alcohol abuse worsened.

In school, Ms. Conner was concerned that Hall was severely depressed. She had several conversations with Hall's father, who told her that "he had washed his hands of Hall and did not want to know anything else." *Id.* at 36a. Hall was absent from school for about six weeks in the spring of 1996. Hall told Ms. Conner that he had a fight with his mother because he had been drinking too much and that his father was ignoring him. She recounted that

> [w]hen he returned, his hair was rarely washed, he rarely washed his hands, his clothes were always rumpled and never seemed to be clean, and Hall was very, very depressed. Hall almost looked drugged – he could barely keep his head up and his eyes focused when he was spoken to.

Id.

The state presented testimony from a co-worker at the grocery store where Hall worked, who testified that Hall was able to learn how to bag groceries and repeat back the co-worker's instructions. *Id.* at 41a-42a. The state also presented testimony from the police officer who gave Hall his *Miranda* warning upon being arrested. The officer testified that Hall subsequently made a statement and appeared to understand what was being said to him. *Id.* at 43a.

After a closing statement from Hall's defense attorney that discussed Hall's mental capacity in light of his inability to understand the wrongness of his crime, *see id.* at 44a,[5] and a rebuttal from the state arguing that mental retardation was irrelevant to the mitigation question, *id.*, the jury answered "no" to the special issue and Hall was sentenced to death, *id.* at 45a. At no time was the jury given a definition of mental retardation or asked to decide whether Hall was in fact mentally retarded. *See id.*

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[5] *Cf. Atkins*, 536 U.S. at 318 ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial.").

C. Initial Direct Appeal Proceedings

The Texas Court of Criminal Appeals ("CCA") decided Hall's direct appeal in 2002 while *Atkins* was pending before this Court. *See id.* at 313a. The CCA rejected Hall's argument that executing the mentally retarded was unconstitutional. *Id.* at 325a-26a. Pointing out Dr. Cunningham's "concession" that Hall was "only" mildly mentally retarded, the court affirmed Hall's death sentence on the ground that jurors could have relied upon Dr. Price's testimony, the testimony of Hall's co-worker, and a videotaped interview with Hall. *Id.* at 327a.

Six months later, this Court held in *Atkins* that the execution of mentally retarded defendants is unconstitutional. 536 U.S. at 308-09. Hall sought certiorari. This Court granted certiorari, vacated the decision below, and remanded for further consideration in light of *Atkins*. *Hall v. Texas*, 537 U.S. 802 (2002).

D. State Post-Conviction Proceedings

At the same time he was filing his petition for certiorari, Hall also applied for state habeas relief, requesting a live evidentiary hearing to determine whether he was mentally retarded. In support of his application, he offered affidavits from (1) a psychologist who diagnosed Hall as mentally retarded and noted that his physical appearance was consistent with fetal alcohol syndrome, (2) a fellow death row inmate who averred that Hall was known as "Half-Deck" by guards and other inmates, (3) a former teacher who described Hall's extremely poor classroom performance and demeanor, and (4) two of

Hall's previous attorneys, who described the difficulty Hall had in understanding the basic legal concepts involved in his case and the way he would parrot phrases he had heard in order to mask his low intelligence. *See id.* at 46a-56a.

The state offered opposing affidavits from three prison guards and two prison employees (who wrote that Hall "seemed pretty normal," pointed out that he had no trouble following prison rules, and contrasted Hall with children who have Down Syndrome), as well as from Dr. Price (who repeated his equivocal trial testimony) and the psychiatrist who had determined Hall's competency to stand trial (who offered no opinion as to whether Hall was mentally retarded). *Id.* at 56a-57a.

The same judge who had heard the criminal trial presided over the habeas proceedings. Because *Ex parte Briseno* had not yet been decided, the court proceeded without the benefit of a formal definition for mental retardation for the purpose of deciding *Atkins* claims in Texas. Relying on the affidavits and her personal recollections from trial – and without hearing any live testimony – the court adopted without alteration the state's proposed findings of fact and conclusions of law, *see id.* at 255a, one of which was to give "no weight" to a defense expert's affidavit because she was a licensed psychologist in Oklahoma and not Texas, *id.* at 266a. In turn, the Texas Court of Criminal Appeals adopted the trial court's findings and denied habeas relief. *Id.* at 253a-54a.

E. Proceeding on Remand in Direct Appeal

The Texas Court of Criminal Appeals then heard Hall's direct appeal on remand from this Court. *Id.* at 205a. Emphasizing that Hall had not requested a separate finding on the question of mental retardation at his criminal trial (despite the fact that the trial had taken place two years prior to *Atkins*), *id.* at 206a & n.2, 233a & n.38, the court recited the evidence offered by both sides at trial and in the habeas affidavits. By then, *Ex parte Briseno* had been decided and required the court to adopt a posture of "almost total deference" toward the trial court's findings on mental retardation. *Id.* at 229a, 235a. But rather than acknowledge that Hall's pre-*Atkins* trial court had made no determination on the issue, the divided court deferred instead to the habeas finding that Hall was not mentally retarded. *Id.* at 236a-37a.

Out of "an abundance of caution," the court also conducted a three-sentence review of the evidence, concluding that "the result of that review is that our conclusion has not changed." *Id.* at 237a-38a. As two concurring justices and two dissenting justices noted, there had still been no live testimony on whether Hall was mentally retarded. *Id.* at 239a (Price, J., concurring); *id.* at 250a (Holcombe, J., dissenting).

F. Federal Habeas Proceedings

Hall next filed a petition seeking habeas corpus relief in federal court, again requesting a full and fair hearing to determine whether he was mentally retarded and thus ineligible for the death penalty under *Atkins*. *See id.* at 119a. The district court

denied relief without holding a hearing, finding that Hall's request for a live hearing was procedurally defaulted because it was not raised in the state proceedings. *Id.* at 196a-97a. After "independently review[ing]" the record, the court concluded that "while there is evidence indicative of mental retardation, arguably only of mild mental retardation, there is ample evidence that Hall is not mentally retarded." *Id.* at 195a.

The Fifth Circuit granted a certificate of appealability and reviewed the district court's refusal to hold an evidentiary hearing for abuse of discretion. *Id.* at 114a. Noting that "the facts before us are a core manifestation of a case where the state failed to provide a full and fair hearing," *id.* at 117a, the court strongly criticized the error-ridden opinions of the district and state courts. Among other errors, the Fifth Circuit found that the district court's holding that the live hearing claim was procedurally defaulted was "incorrect," and that the state trial court's decision not to credit an expert witness because she was licensed as a psychologist in Oklahoma rather than Texas was "in the *Atkins* context ... clearly erroneous." *Id.* at 119a-22a.

The court also observed that the state had asserted in its reply to Hall's state habeas petition that Hall had written the following note from prison: "You have to get me out of here because there's no call button. The sink is stopped up. Also there are roaches and a small ass bed. My feet go all the way to the wall because I'm six feet four." *Id.* at 137a. In fact, Hall's note read: "you half to get out of here because there is No call button, the senk is stopd up

also rauch's and small as bed by feet go all the way to the wall because I am 6f4 [sic]." *Id.*

The court held that the district court's denial of an evidentiary hearing was an abuse of discretion and vacated and remanded for further proceedings. *Id.* at 124a.

G. Federal Habeas Proceedings on Remand

On remand from the Fifth Circuit, the district court held a one-day hearing at which witnesses were precluded from testifying on matters that were repetitive of their state testimony.[6]

Immediately prior to the hearing, and more than eight years after Hall's initial criminal trial, the state's expert, Dr. Price, administered an IQ test to Hall, who received a score of 85. *Id.* at 83a. On direct examination, however, Dr. Price definitively stated that the "best indication we have of [Hall's] measured IQ at the time of the crime is 67, plus or minus the confidence interval," and that the same score was also Hall's measured IQ between the date of the crime and Hall's trial. *Id.* at 333a.

Proceeding to the adaptive deficits prong – and in response to the court's questioning about whether Hall had adaptive limitations caused only by his low intelligence – Dr. Price testified that Hall had

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[6] The parties disputed whether the district court was obligated to defer to the state court findings given that they were made without the benefit of a live hearing. As discussed below, the trial court determined that Hall had failed to show that he was mentally retarded both as a matter of first impression and under AEDPA's deferential "clear and convincing" standard. *See infra* at 20 note 8.

adaptive limitations with regard to "home, school, and work" from 1998 to 2000,[7] and that such deficits were related to both low intelligence and "adjustment problems." *Id.* at 335a-36a. The expert testified that there is no way to separate out adaptive deficits caused by low intelligence from those caused by a difficult home life or similar stressors since "all of those things are causes." *Id.* at 338a. During this line of questioning, the district court coined the term "environmental factors," encompassing any factor other than low intellect that may have caused Hall's deficits. *Id.* at 336a.

The district court then questioned Dr. Price further regarding Hall's IQ. The district court asked about the difference between Hall's IQ of 67 at the time of the trial and Dr. Price's subsequent measurement of 85. Dr. Price opined that the earlier scores "were underestimates due to all the external factors going on in [Hall's] life," which included a chaotic home environment. *Id.* at 347a; *see also id.* 349a-50a (acknowledging that depression, abuse, and a poor family life could have affected Hall's IQ score). He further posited that Hall could have intentionally performed poorly on the IQ test given at the time of his trial. *Id.* at 338a. Nevertheless, Dr. Price agreed that the 2000 test was properly administered and scored, and that Hall had put forth good effort on testing that Dr. Price had administered shortly after the 2000 IQ test. *See id.* at 343a.

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[7] The expert testified that there was no way to consider Hall's adaptive deficits after this point in time because of the prison environment, which allows for better adaptation as there is "very little that's required of him." Pet. App at 336a.

Hall's expert, Dr. Cunningham, explained that the test score obtained by Dr. Price was an outlier significantly higher than other scores. The discrepancy, as Dr. Price explained, may have been caused by "problems in the administration or scoring of th[e] test that caused it to depart from standardization and that resulted in inflated scores." Dec. 10, 2008 Hr'g Tr. 110:20-25, 111:1-2. Although expressing his respect for Dr. Price's integrity, Dr. Cunningham stated that "expectancy effects [of the tester] and experimental bias" could contribute to an "inflated score." *Id.* at 118:2-8. Dr. Cunningham also explained that the Flynn Effect – a "well-established finding that IQ scores on full scale tests ... are slowly inflating over time" because "the population as a whole is getting better at the task that these IQ scores test" – could have affected Hall's IQ score in 2008. *Id.* at 79-80.

The district court denied relief, finding that Hall had not shown that he was mentally retarded by a preponderance of the evidence, or that the state court's determination was wrong by clear and convincing evidence. It stated that "[t]he court is satisfied that Hall's intelligence is low, and that in certain respects his behavior does not conform to the behavior of most persons." Pet. App. at 105a. Nonetheless, "the court has not been persuaded by the evidence that Hall's intellectual functioning goes beyond the dividing line between mental retardation ... and less significant forms of learning disability ... or that the limitations he has in adaptive functioning are significantly related to whatever limitations he has in general intellectual functioning." *Id.*

The district court denied a certificate of appealability sua sponte and, in a brief opinion, the Fifth Circuit did the same. Hall's petition for rehearing and rehearing *en banc* was denied on April 1, 2010.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an important opportunity to reaffirm in the face of substantial lower court confusion that *Atkins v. Virginia* requires states to adopt standards for mental retardation that are consistent with clinical standards.

Petitioner Hall was found not to be mentally retarded by the Texas state courts despite the fact that even the state's expert was unwilling to say that Hall was not mentally retarded. And in fact, the evidence of Hall's mental retardation was powerful. Hall's IQ was measured at 67 at the time of his trial, and there was compelling testimony concerning his adaptive deficiencies.

Hall never had a live hearing on the issue of mental retardation in the state courts, so when the federal district court initially denied his habeas petition, the Fifth Circuit remanded for an evidentiary hearing, pointing to the substantial evidence supporting Hall's *Atkins* claim and to errors in the state courts' determination, including the wrongful exclusion of the testimony of one of Hall's expert witnesses. The Fifth Circuit emphasized that if "Hall can prove the facts that he has consistently alleged on appeal, he will be entitled to habeas relief." Pet. App. at 123a.

Under questioning from the district court on remand, the state's expert testified that Hall's IQ score of 67 and his adaptive deficiencies did not demonstrate mental retardation because they could have been due to "environmental factors," such as Hall's traumatic upbringing.

In denying habeas relief, the federal district court repeatedly emphasized that although "Hall's intelligence was low," the court could not determine the extent to which Hall's seeming mental retardation was actually the product of "what [the state's expert] referred to as adjustment problems," such as "the undesirable home and social environments to which Hall was subjected and his emotional problems." *Id.* at 104a-05a. The district court relied on this supposed ambiguity along with lay testimony about Hall's demeanor, largely from prison personnel, to conclude that Hall had failed to carry his burden to show that he was mentally retarded. After the Fifth Circuit denied a certificate of appealability in a brief opinion, this petition followed.

Review is warranted here on two clusters of issues.

1. The lower courts' conclusion that evidence of retardation is insufficient if a low IQ or adaptive deficiencies could possibly be due to environmental factors is contrary to the holdings of other courts and flatly inconsistent with the clinical definition of mental retardation this Court employed in *Atkins*. At least three other courts have recognized that mental retardation has multiple etiologies, and is no less debilitating when it has trauma as one of its

roots. *E.g.*, *Holladay v. Allen*, 555 F.3d 1346, 1358 n.15 (11th Cir. 2009) (discrediting state expert who "seems to ignore the fact that poor home environment is a recognized contributor to mental retardation"). And *Atkins* emphasized that mental retardation must be assessed in accordance with its clinical definition, under which factors such as abusive parenting and domestic violence are recognized *contributors* to mental retardation, so that it is scientifically incoherent to determine mental retardation in isolation from such factors.

Review is especially necessary here because the approach employed below is so sweeping in character. Hall, like many other capital offenders, had a traumatic upbringing, and the lower courts denied relief simply because there was a mere "potential" that his limitations could have had an environmental component. Defendants like Hall will thus be incapable of demonstrating mental retardation because their disability will often, if not always, be arguably related to such environmental factors. Only this Court can correct the Fifth Circuit's error on this important point.

2. The lower courts compounded their environmental factor error with another one regarding Hall's adaptive deficiencies. Under Texas law, adaptive deficiencies are not measured with respect to the categories prescribed in the clinical definition of mental retardation. Instead, Texas courts are instructed to look to a series of questions, typically the subject of lay testimony, that are intended to assess whether the defendant has certain strengths. *See Ex parte Briseno*, 135 S.W.3d at 8-9.

For example, the *Briseno* framework asks whether the defendant has exhibited leadership, and whether he is capable of following through on plans. *See id.*

The *Briseno* questions stand in stark contrast to the clinical approach, which recognizes that the mentally retarded are often capable of showing cognitive strengths in certain areas, and that those strengths will co-exist with adaptive deficiencies. The clinical approach also requires expert evaluation of adaptive deficiency, while the *Briseno* factors are expressly intended to allow lay witnesses to answer the pertinent questions. *Id.* at 8 (proposing factors because "undoubtedly experts will be found to offer opinions on both sides of the issue in most cases").

Briseno's focus on lay testimony and adaptive strengths allowed the lower courts to credit the lay testimony of state prison guards who testified that Hall seemed "normal" to them. It also allowed the trial court to discredit expert testimony that Hall suffered from adaptive deficiencies despite the fact that he may have seemed normal to his guards. (And, of course, the state's expert did testify that Hall had adaptive deficiencies, but that he believed that they may have been caused in part by environmental factors, and thus did not actually indicate mental retardation.)

Briseno is out of step with the ten other states that have by statute or case law expressly adopted clinical categories for assessing adaptive deficiencies, and has been widely criticized on that basis. This Court should grant review to reaffirm that states may not depart from what clinical standards require.

I. This Court Should Review The Determination Below That A Sub-70 IQ And Adaptive Limitations Do Not Satisfy *Atkins* Where Those Deficiencies May Have Been Caused, Even In Part, By "Environmental" Factors.

A. Review Is Warranted Because There Is A Substantial Split of Authority On This Issue.

The question whether – and to what extent – traumatic environmental factors, such as abusive home life, "count" in assessing a person's IQ and adaptive limitations is one that has divided courts around the country. In Hall's case, the potential effect of environmental factors was decisive in the decision to allow his death sentence to stand.

Specifically, the record below showed that Hall had an IQ of 67 at the time of the crime. The lower courts nevertheless discounted that score in favor of a higher score on an IQ test administered by the state's expert eight years later, on the ground that the earlier score "could have [been] artificially lowered" by "Hall's home and social environments," a reference to Hall's traumatic upbringing. Pet. App. at 103a-04a.

Likewise, although the record further showed that even the state's expert agreed that Hall suffered from significant adaptive behavior deficits, including deficits in "home, school, and work," *id.* at 337a, the lower courts concluded that those deficits did not demonstrate mental retardation because they could have been caused by "the undesirable home and social environments to which Hall was subjected and

his emotional problems," *id.* at 104a. As the trial court summed up, "[t]he court is satisfied that Hall's intelligence is low, and that in certain respects his behavior does not conform to the behavior of most persons." *Id.* at 105a. But it went on to conclude that it "has not been persuaded by the evidence that Hall's intellectual functioning goes beyond the dividing line between mental retardation ... and less significant forms of learning disability ... or that the limitations he has in adaptive functioning are significantly related to whatever limitations he has in general intellectual functioning."[8] *Id.* In short,

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[8] To be sure, the district court purported to find other flaws in Hall's showing of mental retardation, but those asserted flaws do not change the dispositive character of its treatment of environmental factors. For example, although the district court found Hall's expert to be less credible than the State's expert, that was largely with respect to the state expert's testimony that environmental factors could influence measures of mental retardation. And while the district court speculated that Hall's IQ score of 67 could have been the result of intentional malingering, that speculation did not form a substantial basis for the district court's conclusion.

Likewise, while the district court found Hall not mentally retarded both as a matter of first impression and as a matter of AEDPA deference, the dual grounds for the decision do not impose a barrier to review. The trial court relied almost entirely on the state's expert's *federal* habeas testimony to support its de novo conclusion. That expert's prior state court testimony was that he could *not* say that Hall was not mentally retarded. Pet. App. at 216a ("Q: Were you able to determine whether or not Michael Hall was mentally retarded? A: Well, I'm not as convinced that he is as Dr. Cunningham is. He is at that level where it's either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded. It's – it's sort of a judgment call." (trial proceedings)); *see also id.* at 228a ("My review of this case does not clearly indicate that Michael

because the lower courts found that they could not separate Hall's "true" intelligence from the effects of his traumatic upbringing, they concluded that he failed to demonstrate mental retardation.

The Mississippi Supreme Court has adopted a similar approach to environmental factors, while the Eleventh Circuit and high courts in Oklahoma and Alabama have refused to discount facially sufficient evidence of mental retardation on the ground that it could have been influenced by a traumatic home environment. In *Doss v. State*, 19 So. 3d 690 (Miss. 2009), a divided Mississippi Supreme Court affirmed the trial court's determination that the defendant was not mentally retarded when the trial court relied, in part, on an expert's opinion that the defendant's "problems in areas such as functional academics, work, self-direction, health, and safety were better explained by his chaotic upbringing than by intellectual deficits." *Id.* The dissent in *Doss* criticized the majority's holding, asserting that "there is no requirement in the [clinical] definitions ... that the deficits in adaptive

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Hall is mentally retarded." (state habeas proceedings)). It was only during the federal hearing that the state's expert changed his opinion to say that Hall's disabilities did not qualify as mental retardation because they may have in part been due to environmental factors. Had the district court discounted this testimony, there would have been no basis to find Hall not mentally retarded, either as a matter of first impression or after applying AEDPA deference. And this Court need not decide the question of whether the state proceedings were entitled to any deference at all in light of the fact that they failed to provide Hall with a live hearing and the opportunity to cross-examine the state's witnesses.

functioning must be 'due to the effects of subaverage intellectual functioning,' much less that the adaptive deficits 'stem from severe intellectual deficits.'" *Id.* at 734 (Graves, J., dissenting).

On the other end of the spectrum – and in direct contrast to the position taken by the lower courts in Hall's case – the Oklahoma Court of Criminal Appeals has recognized that adaptive "limitations may also be caused by other mental *or social conditions*" and that a defendant therefore need not "show that mental retardation is the cause of his limitations in [adaptive functioning]." *Lambert v. State*, 126 P.3d 646, 651 (Okla. Crim. App. 2005) (emphasis added). The court held that the state could not undercut evidence showing adaptive limitations by claiming that those limitations were caused by environment rather than by organic neurological problems. *Id.* at 653.

Likewise, in *Holladay v. Allen*, 553 F.3d 1346, the Eleventh Circuit concluded that the district court did not err in rejecting an expert's opinion that evidence of low IQ should be dismissed because the low IQ was caused by a poor home environment and learning disability, rather than mental retardation. *Id.* at 1358. Significantly, the court observed that the expert "seems to ignore the fact that poor home environment is a recognized contributor to mental retardation." *Id.* at 1358 n.15. The Eleventh Circuit also favorably cited district court's rejection of the state expert's testimony for "a number of reasons," including the expert's reasoning that the defendant's adaptive deficiencies were explained by "his home

environment." *Id.* at 1352, 1362 (citing district court opinion).

And in *Morrow v. State*, 928 So. 2d 318 (Ala. Crim. App. 2004), the Alabama Criminal Court of Appeals found that the defendant had raised an inference of mental retardation and was entitled to an evidentiary hearing based, in part, on evidence that the defendant suffered from adaptive deficits due to low intellectual functioning *and* his home environment. *Id.* at 320.

The division among the courts is substantial and important, and it can be resolved only by this Court. Had Hall's case come up through the Oklahoma courts, rather than the Texas courts, he would have been found mentally retarded within the meaning of *Atkins*, because those courts would have recognized Hall's traumatic upbringing as a bona fide cause of mental retardation.

B. Review is Warranted Because The Fifth Circuit Erred In Denying the Certificate Of Appealability.

Review is also warranted because the decision below is incorrect. Hall was entitled to the certificate of appealability he sought if he could show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Hall's contention – that an otherwise sufficient showing of mental retardation is not impeached because some portion of the disability is due to environmental factors – is not just "debatable," it is correct.

In *Atkins*, this Court repeatedly referenced *clinical* definitions of mental retardation. The Court began by fully quoting the two primary medical definitions of mental retardation from the AAMR and APA, 536 U.S. at 308 n.3, and then proceeded to describe the findings of a forensic psychologist, including his testing methodology and clinical conclusions. *Id.* at 308-09 & nn.4-5. The Court also noted that statutory definitions of mental retardation generally track the clinical definitions, *id.* at 317 n.22, and reiterated that "clinical definitions of mental retardation require" the establishment of these three elements, *id.* at 318. In short, the *Atkins* Court made clear that mental retardation is a medical condition, and that the implementation of the protection set forth in *Atkins* must be firmly grounded in a clinical definition of mental retardation. Indeed, unlike other areas of the law in which a medical diagnosis is relevant to but not dispositive of the legal standard, e.g. insanity or competence to stand trial, *Atkins* makes clear that here the medical diagnosis *is* the legal standard.

That the Court – quoting *Ford v. Wainwright*, 477 U.S. 399 (1986) – "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction,'" 536 U.S. at 317 (first bracket added), does not invalidate the significance of the clinical definitions. To the contrary, *Ford* itself stood for the proposition that even where states have latitude in implementing their own procedures to secure constitutional guarantees, those procedures cannot alter or compromise the substance of those guarantees. *Ford*, 477 U.S. at 405 ("[T]he adequacy

of the procedures chosen by a State to determine sanity ... will depend upon ... whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner."). Indeed, in *Ford* the Court found state procedures inadequate because they did not sufficiently safeguard the constitutional prohibition on the execution of the insane. *Id.* at 416-17. Thus, the delegation to the states of procedures for implementing *Atkins* must not be read to undermine the constitutional prohibition on the execution of the mentally retarded, or the clinical definition of mental retardation in which the prohibition is rooted.

With these principles in mind, it is clear that the lower courts here strayed far from the clinical grounding set forth in *Atkins*, because the leading clinical definitions of mental retardation recognize the role environmental factors play in causing retardation. The APA's definition recognizes that there is no one cause of mental retardation: "Mental retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." *Atkins*, 536 U.S. 308 n.3 (internal quotation marks omitted). Similarly, the AAIDD expressly identifies numerous non-biological risk factors that are recognized as causes of mental retardation, including "[i]mpaired child care-giver," "[f]amily poverty," and "[d]omestic violence." *AAIDD 2010 Definition* 60; *see also id.* 58-59 ("Etiology is conceptualized as a multifactorial construct composed of four categories of risk factors (biomedical, social, behavioral, and educational) that

interact across time, including across the life of the individual and across generations from parent to child."). Accordingly, the AAIDD has stated that "genetics cannot explain the cause of [mental retardation] in every case," as an individual "may be born with perfectly normal DNA and still develop [mental retardation] due to a birth injury, malnutrition, child abuse, or extreme social deprivation." *Id.* at 59; *see also id.* at 61 ("Because [mental retardation] is characterized by impaired functioning, its etiology is whatever causes this impairment in functioning. A biomedical risk factor may be present but by itself may not cause [mental retardation].").

It is nearly impossible to identify which of the many possible causes of mental retardation is most salient in a given case. *See id.* at 59-60. Indeed, even the state's expert recognized as much when pressed by the court to distinguish between deficits caused by innate intellectual limitations and those caused by environmental factors. Pet. App at 337a ("[A]ll of those things are causes.").

Against this backdrop, the district court imposed an insurmountable barrier by requiring that Hall demonstrate that his deficiencies were *not* caused by environmental factors. This requirement flies in the face of clinical understandings of mental retardation. Indeed, it entirely precluded Hall from demonstrating that he is, in fact, mentally retarded, because his "undesirable home environment" undoubtedly had some effect on his capabilities. The state's expert testified that "[t]here is evidence that [Hall] had adaptive behavior deficits that in my

opinion were related to both his low intelligence and his adjustment problems," and that there was no way to separate out the causes. *Id.* at 335a-36a. Rather than crediting this testimony as evidence that Hall had adaptive behavior deficits, the court instead concluded that Hall was not mentally retarded because, while "[t]here is a possibility that Hall has adaptive functioning deficits that are related to low intelligence, ... the court is unable to find from the evidence the degree to which that is so as distinguished from the degree to which whatever deficits Hall might have are related to adjustment problems." *Id.* at 104a-05a; *see also id.* at 105a. Likewise, the court discounted Hall's earlier IQ scores as being artificially lowered by environmental factors, notwithstanding the state expert's testimony that 67 was the best indication of Hall's IQ at the time of the crime and trial. Under the district court's analysis, so long as any environmental risk factors are present, a defendant will be unable to prove mental retardation.

Not only does that analysis flatly contradict the clinical understandings of mental retardation, but – by making the presence of environmental factors determinative in the mental retardation assessment – the lower court has essentially disqualified an entire category of individuals from *Atkins* relief. Ironically, these are the very same individuals, according to clinical understanding, that are most likely to be mentally retarded.[9]

[9] This analysis also means that defendants who introduce evidence of a detrimental environment as a mitigating factor

II. Texas's Contra-Clinical Approach To Assessing Adaptive Limitations Also Warrants Review.

A. Under the *Briseno* framework, Texas courts depart from clinical standards by using misleading questions to gauge adaptive limitations.

The decision below also implicates – and wrongly decides – another set of important issues bearing on adaptive deficiency. The lower courts applied Texas's *Briseno* framework for assessing adaptive deficiencies. In *Briseno*, the Texas Court of Criminal Appeals created a list of factors, without reference to scientific or other authority, for the trier of fact to "focus on" when considering if a criminal defendant has adaptive limitations:

- Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?

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thereby undercut any claim of mental retardation. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 319-20 (1989) (sentencer must be able to give effect to mitigating evidence of defendant's disadvantaged background).

- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

135 S.W.3d at 8-9.

These subjective factors depart from the clinical definition of adaptive deficiencies in two important ways. First, the factors are entirely different in form and focus from the factors specified in the clinical definition of adaptive deficiency. The APA and pre-2002 AAMR definitions require a significant limitation in two of eleven or ten areas (respectively) of adaptive functioning, *see supra* n.1, while the present AAIDD definition requires a limitation in one of three general areas – conceptual, social, and practical. *AAIDD 2010 Definition* at 43. Thus, a

clinical assessment recognizes that, contrary to conventional wisdom, a mentally retarded person need not, and likely will not, exhibit deficiencies in all aspects of life. Instead, "[a]daptive skill limitations often coexist with strengths" in other adaptive skill areas. *AAIDD 2010 Definition* at 45; *see also id.* at 7 ("[P]eople with [mental retardation] are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than others. Individuals may have capabilities and strengths that are independent of their [mental retardation] (e.g., strengths in social or physical capabilities, some adaptive skill areas, or one aspect of an adaptive skill in which they otherwise show an overall limitation."), *id.* at 47 ("[I]n the process of diagnosing [mental retardation], significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills."). This clinical perspective stands in stark contrast to the *Briseno* focus on what a defendant *can* do, such as formulate plans, act appropriately, or respond coherently to questions.

Second, the *Briseno* factors are intended to allow the factfinder to avoid reliance on expert testimony. In adopting these factors, the Texas Court of Criminal Appeals stated that they were necessary because "undoubtedly experts will be found to offer opinions on both sides of the issue in most cases." 135 S.W.3d at 8. The *Briseno* factors thus allow a finding of adaptive deficiency based not on a clinical diagnosis, but rather lay testimony about how the individual appears in his daily life. In contrast, the

clinical definition makes clear that "[c]linical judgment is a key component" which "emerges directly from extensive data and is based on training, experiences, and specific knowledge of the person and his or her environment." *AAIDD 2010 Definition* 85. Such clinical judgment is especially important when assessing the mildly mentally retarded, because lay persons are likely to be misled by the "'cloak of competence,' ... the powerful tendency of mildly mentally retarded people to mask or compensate for their deficits," for example by parroting back phrases or otherwise simulating comprehension. *United States v. Davis*, 611 F. Supp. 2d 472, 494 (D. Md. 2009). *Briseno* sidesteps this clinical diagnostic approach, instead asking whether lay persons considered the defendant mentally retarded.

The decision below reflects both of *Briseno*'s shortcomings by focusing on lay testimony on areas of adaptive competence. The court credited lay testimony primarily from state prison guards and other government personnel – who testified that Hall seemed "normal" to them. Pet. App. at 57a (prison guard had been exposed to other mentally retarded persons and opined that "Hall acted as normal as anyone in his pod"); *id.* at 58a (prison guard "never saw anything that would make her think Hall was mentally retarded"); *id.* (prison guard "did not see any sign of mental retardation"); *id.* at 59a (prison employee had been exposed to persons with Down Syndrome and "had not seen anything at all that indicated Hall was mentally retarded"). These witnesses could not and did not provide a holistic

assessment of Hall; instead, they focused on episodic aspects of his behavior. *Id.* at 43a (Hall "looked Officer Nutt in the eye and told him he understood" his *Miranda* warning, and later "appeared to understand what was being said" in interview with officer); *id.* at 57a (prison guard testified Hall played basketball, listened to rock and roll music, and apparently understood how to obey orders and follow the rules); *id.* at 59a (prison guard testified Hall traded property with another prisoner in violation of the rules and desisted when ordered to do so).

The lower courts credited this testimony over testimony by other individuals who knew Hall well and who testified that Hall often sought to mask his deficiencies. For example, Hall's appointed attorney at trial testified in Hall's state habeas proceedings that Hall "would attempt to 'mask' his retardation by not asking questions," because he "bitterly did not want people to think him 'dumb.'" *Id.* at 53a. Furthermore, Hall "would sometimes appear to be surprisingly well informed on a topic, but as the discussion would continue, it would become apparent to [his attorney] that [Hall] was 'parroting' words and phrases that he had heard, with little or no grasp on the terms he was using." *Id.*; *see also id.* at 32a-33a (high school shop class instructor stated that "[w]hen he gave Hall instructions, Hall would say that he understood, but he really did not"); *id.* at 35a (high school teacher with extensive contact stated, "Hall attempted to conceal his shortcomings by bragging and boasting. It sounded as if he was repeating things that he had heard previously ... ."); *id.* at 51a (court-appointed attorney stated Hall was

unable to grasp legal concepts applicable to his case, but in order to mask his retardation would say he understood "and then immediately call and ask the same questions over and over again").

The lower courts also discounted testimony from Hall's expert, who opined that Hall had adaptive deficiencies and explained that "you typically can't tell that somebody is mildly mentally retarded by simply having a conversation with them. They may be able to express themselves. They have reading ability through about sixth grade. They may be able to do many things." Hr'g Tr. 68:3-7 (Cunningham).[10]

Under *Briseno*, this evidence could and did allow the lower courts to conclude that Hall did not suffer from adaptive deficiencies. Because Hall appeared "normal" to some, the lower courts did not investigate, as the clinical understanding of adaptive deficiencies requires, whether Hall's seeming competency in some areas masked deficiencies in others. Instead, the lower court simply credited testimony of the state's witnesses on the ground that they were supposedly more objective (a doubtful proposition given that most of them were prison guards or law enforcement officials employed by the state) without looking into whether that testimony established a clinical showing of adaptive deficiency.

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[10] The State's expert of course testified that Hall *did* have adaptive deficiencies, but that he was uncertain to what extent they were caused by Hall's home environment – a distinction that is untenable. *See supra* at 19-20.

B. Review is Warranted Because The *Briseno* Framework Is Invalid Under *Atkins*' Clinical Approach, and Because There Is Substantial Confusion in The Lower Courts In This Area.

The district court's impermissible focus on lay testimony highlights Texas's problematic deviation from clinical understandings of mental retardation. Texas's *Briseno* framework and the importance of lay testimony within it warrants review by this Court, both because it is incorrect and clinically unsound, and because it is emblematic of growing confusion around the country about the definition of adaptive deficiency.

In *Atkins*, this Court mandated the use of clinical definitions of mental retardation. *See supra*. While states are free to use a variety of approaches to implement those clinical definitions, at bottom mental retardation must be determined by a definition and process that is consistent with the national consensus that defines mental retardation in "general[] conform[ity with] the clinical definitions" of the condition. 536 U.S. at 317 n.22. The *Briseno* approach is at odds with the clinical definition. Indeed, the Texas Court of Criminal Appeals has itself described the *Briseno* questions as "non-diagnostic criteria." *Ex parte Van Alstyne*, 239 S.W.3d. 815, 820 (Tex. Crim App. 2007) (per curiam). And Judge Price of that court has recently noted in dissent that *Briseno* has been roundly criticized by commentators because it sidesteps the required clinical framework to mandate consideration of factors that may easily coexist with significant

adaptive deficiencies. *See Lizcano v. State*, No. AP-75,879, 2010 WL 1817772 at *35 & n.23 (Tex. Crim. App. May 5, 2010) (Price, J., dissenting); *see also, e.g.*, John H. Blume, Sheri Lynn Johnson, & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 714 (2009) ("[T]he *Briseno* factors focus on a few facts, which portray stereotype, strength-first or strength-only reasoning, at best a handful of itemized weaknesses, and are satisfied by answers to those questions alone."); Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*:* *Lessons From Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 727-28 (Spring 2008) (*Briseno* factors deviate from the methodology of "professionals in the field, [who] use standardized criteria to detect significantly subaverage adaptive functioning. [T]he court-crafted overlay for assessing deficits in adaptive behavior in capital cases is not grounded in professional practice or guidelines." (footnotes omitted)). Texas thus wrongly allows the factfinder to look to misleading, non-clinically grounded evidence to determine the presence of adaptive deficiencies.

Briseno also contributes to growing confusion around the country about the definition of adaptive deficiencies. At least one other state, like Texas, has created its own non-clinically based categories for assessing adaptive deficiencies. *See State v. Dunn*, NO. 2001-KA-1635, --- So. 3d ---, 2010 WL 2011565, at *8 (La. May 11, 2010) (citing clinical definition,

but assessing skill in "self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living"). In contrast, at least ten states, either by statute or case law, directly incorporate clinical categories for assessing adaptive deficiencies. *See* Del. Code tit. 11, § 4209 (d)(3)d.1; Idaho Code Ann. § 19-2515A(1)(a); 725 Ill. Comp. Stat. 5/114-15(d); *Hughes v. State*, 892 So. 2d 203, 216 (Miss. 2004); *Wiley v. State*, 890 So. 2d 892, 895 (Miss. 2004); Mo. Ann. Stat. § 565.030(6); N.C. Gen. Stat. Ann. § 15A-2005(a)(1)b; *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002); *Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006); *Commonwealth v. Miller*, 888 A.2d 624, 630-31 (Pa. 2005); Va. Code Ann. § 9.2-264.3:1.1(A).

And even apart from the precise categories themselves, there is substantial confusion concerning the way evidence is to be interpreted within them. As noted above, *Briseno* allowed the lower courts here to credit testimony of prison officials over compelling expert testimony that Hall had adaptive deficiencies even though they might not be apparent from casual conversations. Other states, consistent with clinical practices, have recognized the dangers in that approach. For example, the Oklahoma high court in *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2005), credited expert testimony that a defendant's seeming competency in prison can be misleading because "mentally retarded persons adapt very well to institutional settings such as prison, and are unlikely to exhibit problems with impulse control in those settings." *Id.* at 652; *see also State v. Arellano*, 143 P.3d 1015, 1020 n.3 (Ariz.

2006) ("[N]on-expert observations 'receive little or no weight from clinical experts if they are made in the context of atypical environments (such as prison)).'" (citation omitted)).

Thus, in assessing adaptive limitations, some states maintain the clinical focus required by *Atkins*, while some states, like Texas, have crafted new tests based on misleading stereotypes of mental retardation and uninformed lay testimony. As a result, whether a mentally retarded defendant can effectively evoke the protections described in *Atkins* depends on the accident of the jurisdiction in which he is tried.

CONCLUSION

The petition for a writ of certiorari should be granted.

June 30, 2010

Respectfully submitted,

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Appendix A

FILED: February 22, 2010

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-70015

MICHAEL WAYNE HALL,

Petitioner - Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges. PER CURIAM:

We previously remanded this habeas matter to the district court for an evidentiary hearing on whether the petitioner is mentally retarded and, thus, ineligible for the death penalty, a sentence of

the Texas state court.[1] After conducting a hearing, the federal district court found that Hall was not retarded. Reasonable jurists would not disagree with the careful analysis of the district court or that the issues presented were inadequate to deserve encouragement to proceed further.[2]

Hall also seeks a certificate of appealability (COA) on two other issues: whether the Texas death penalty statute or the mitigation special issue submitted to the jury violates the Constitution. Ultimately, Hall has failed to make a substantial showing of the denial of a constitutional right - for essentially the reasons stated by the district court.[3]

We deny each of Hall's requests for a COA.

PATRICK E. HIGGINBOTHAM, concurring:

There is no question but that the district court's rejection of Hall's claim of retardation must be affirmed - given that the district court had to defer to

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[1] *See generally Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008).

[2] *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). We note that the district court on remand - despite Hall's claim that it should not have - properly gave deference to the state court's determinations of factual issues. *See* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.")

[3] *See Hall v. Quarterman*, 443 F. Supp. 2d 815 (N.D. Tex. 2006), *vacated on other grounds by Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008).

the state court's factual findings by direction of this court.

Persuaded that the state court had denied Hall due process in its handling of his claim of retardation, I would have remanded to state court for "a hearing that not only affords the opportunity to confront and cross examine the state witnesses but also a hearing free of the deference the federal district court must give to the state adjudication of retardation . . . ."[4] The able district court on remand, well aware of the panel division on this point, conducted a searching live hearing into Hall's mental capacity and found - both with the commanded deference to the state court and as an *original* matter - that Hall was not retarded. While I do not retreat from my views that the state of Texas should have been given the opportunity to afford Hall the hearing due to him, I cannot but agree that Judge McBryde gave Hall's claim all the care and attention due an exemplar of what the state ought to have done.

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[4] *Hall v. Quarterman*, 534 F.3d 365, 397-98 (5th Cir. 2008) (Higginbotham, J., concurring in part and dissenting in part).

Appendix B

United States District Court, N.D. Texas,
Fort Worth Division.

Michael Wayne HALL, Petitioner,
v.
Nathaniel QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.

No. 4:06-CV-436-A.

March 9, 2009.

MEMORANDUM OPINION and ORDER

JOHN McBRYDE, District Judge.

This case is back before the court by reason of an order of reversal and remand by the United States Court of Appeals for the Fifth Circuit with the direction that the court conduct a hearing on the claim of petitioner, Michael Wayne Hall, ("Hall"), who is now subject to the penalty of death arising from a planned thrill killing of Amy Robinson by Hall and his friend, Robert Neville,[1] ("Neville") on February 15, 1998, that he is mentally retarded.[2] The impetus for the remand was the decision of the Supreme Court in *Atkins v. Virginia* that the execution of a mentally retarded defendant violates

[1] On December 18, 1998, Neville was sentenced to death for Amy Robinson's murder and his sentence was carried out on February 8, 2006.

[2] *Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008).

the Eighth Amendment to the Federal Constitution. 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The Supreme Court concluded that a national consensus had developed that mentally retarded offenders should not be subjected to the death penalty. *Id.* at 316.

After a thorough review of the record and full consideration of the applicable authorities and briefs of the parties, the court has concluded that the relief sought by Hall's application under 28 U.S.C. § 2254 should be denied.

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I.

History of Hall's Criminal Case

The facts of Hall's crime and the history of his criminal case, commencing with his indictment, going through his appeals and habeas proceedings, and ending up here again, are found in three published opinions: first, the May 5, 2004, opinion of the Court of Criminal Appeals of Texas, *Hall v. State*, 160 S.W.3d 24 (Tex. Crim. App. 2004) (en banc) (in which the court concluded that the evidence adduced at Hall's trial and in his state habeas action supported findings that Hall's mental retardation claim was without merit, and, therefore, he was eligible for the death penalty); next, the August 3, 2006, memorandum opinion and order of this court, *Hall v. Quarterman*, 443 F. Supp. 2d 815 (N.D. Tex. 2006) (in which this court concluded that Hall did not overcome the deference owed under 28 U.S.C. § 2254 to the state court's adjudication that Hall's

mental retardation claim was without merit, and denied Hall's § 2254 application); and, finally, the June 30, 2008, opinion of the Fifth Circuit, *Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008) (in which the Fifth Circuit concluded that this court erred in failing to conduct a hearing on Hall's claim of mental retardation, reversed this court's August 3, 2006, denial of Hall's habeas application, and remanded the case to this court for a hearing). The court refers the reader to those opinions.

II.
Issues Now Before the Court

Although the court conducted an evidentiary hearing on December 10, 2008, on the issue of Hall's claim of mental retardation, as the Fifth Circuit ordered, the court continues to owe deference to the state court's adjudication that Hall's mental retardation claim was without merit and the state court's determinations of factual issues related to that claim. The pertinent parts of 28 U.S.C. § 2254 direct that:

> (d) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In *Valdez v. Cockrell*, 274 F.3d 941, 950-51, 959 (5th Cir. 2001), the Fifth Circuit explained that "a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme." *Id.* at 959. Thus, even though the state court did not provide a full and fair hearing on the mental retardation issue and this court had a hearing on that issue, this court is obligated to give § 2254 deference to the state court's adjudication and the determinations of factual issues made by the state court.[3]

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[3] A concern Judge Higginbotham had with the decision of the majority of the panel in *Hall v. Quarterman* to order this court to have a hearing rather than to direct the state court to have a hearing was that this court could not hold "a hearing free of the deference the federal district court must give to the state adjudication of retardation ...." 534 F.3d 365, 398 (5th Cir. 2008) (Higginbotham, J., dissenting).

As reflected by the discussion between court and attorneys at pages 10-12 of the transcript of the December 10, 2008, hearing in this court, the parties agreed that the purpose of the hearing was to provide the court basis to determine whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence. Stated another way, the parties agreed that § 2254 deference is required and that the court need concern itself only with the deference requirement of § 2254(e)(1).

To the end of further defining the issues before the court, the parties stipulated to a definition of mental retardation which, as modified verbally at the hearing, is as follows:

> Mental retardation is a disability characterized by: (1) significantly subaverage general intellectual functioning [defined as an IQ of about 70 or below]; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.

J. Stipulation to Hr'g Exs. filed Dec. 9, 2008, at 2; Tr. of Dec. 10, 2008, Hr'g at 12-13.

III.

State Court Proceedings Specific to Whether Hall is Mentally Retarded, and the State Court's Adjudication and Determinations of Factual Issues Related to that Subject

A. *General Remarks*

Because the court, is required by 28 U.S.C. § 2254 to give deference to the state court's adjudication and determinations of factual issues pertinent to the mental retardation issue, the court must consider the state court proceedings, including the evidence received at Hall's trial, the evidence received as a part of his state habeas action, and the state court's adjudication and determinations of factual issues.[4] Therefore, the court discusses those things in some detail[5] before proceeding to a discussion of the evidence received at the December 10, 2008, hearing and the impact, if any, that evidence has on the state court's adjudication and determinations.

B. *State Court Trial Proceedings*

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[4] The state court's adjudication and determinations of factual issues related to Hall's mental retardation claim were based on evidence received during Hall's criminal trial, particularly the punishment phase, as well as additional evidence presented to the state court as part of Hall's state habeas action. *Hall v. State*, 160 S.W.3d 24, 27-35, 38 (Tex. Crim. App. 2004).

[5] Necessarily the court has omitted some of the details given in the state court evidence. Nevertheless, all the evidence is being considered by the court in its analysis, findings, and conclusions.

1. *Evidence Received at Hall's February 2000 Criminal Trial*

a. *General*

Even though the jury in Hall's criminal trial was not asked to decide whether Hall was mentally retarded, significant time was devoted at the trial, primarily at the punishment phase, to the development of evidence bearing on Hall's mental retardation contention.

The issue of mental retardation was touched on during the guilt phase of the trial. Hall's supervisor when he was employed at a Kroger store responded to a question asking if Hall appeared to be mentally challenged by saying, "No. He was lazy, but he wasn't mentally challenged, in my opinion." *Hall,* 160 S.W.3d at 27. The facts of and planning for the offense and the post-offense conduct of Hall and Neville, which tended to demonstrate that Hall had the ability to make reasoned, albeit extremely undesirable, decisions, were before the fact finder for consideration. The videotape of Hall's interview by news media personnel following his arrest provided the fact finder a chance to observe Hall carrying on a normal conversation, during which he displayed a rational understanding of what he had done and that the consequence of his conduct probably would be the death penalty.

b. *The Expert Witnesses Dr. Cunningham and Dr. Price*

At the punishment phase, Mark Douglas

Cunningham, Ph.D., and J. Randall Price, Ph.D. (the same two expert witnesses who testified at the December 10, 2008, hearing) testified at length, and were subjected to extensive cross-examination. Dr. Cunningham's testimony for the defense occupies 260 pages of the transcript of the evidence received at Hall's trial. One hundred sixty-three of those pages were devoted to direct examination, 68 to cross-examination, 26 to redirect, and 3 to re-cross. Most of Dr Cunningham's testimony at each stage of the questioning was on the subject of mental retardation and his qualifications to speak to that subject. Dr. Price's testimony for the State is spread over 82 pages of the trial transcript, 37 pages of which were devoted to direct examination by the prosecutor, 40 to cross-examination, 4 to redirect, and 1 to re-cross. Dr. Price's testimony was devoted in its entirety to the subject of mental retardation and his qualifications to give opinions on that subject.

Dr. Cunningham said that his occupation was as a clinical and forensic psychologist. His testimony established that he was an experienced expert witness in death penalty cases, apparently earning hundreds of thousands of dollars per year from that activity. Dr. Price described his business, occupation, or profession as a clinical and forensic psychologist and a neuropsychologist. He had testified between seventy-five and one hundred times in capital sentencing cases. About seventy percent of the time Dr. Price testified for the defense, and about thirty percent of the time he testified at the request of the prosecution.

Dr. Cunningham's description of the standard he used to determine whether Hall was mentally retarded was similar to the standard to which the parties stipulated in this action. The difference between the two is that the standard Dr. Cunningham used at trial was more favorable to Hall than the stipulated standard because of the higher IQ score incorporated into Dr. Cunningham's trial standard. Dr. Cunningham explained during his trial testimony that:

> Now, a diagnosis of mental retardation requires really three elements. The first one is an IQ score below 75. The second one is significant deficits in at least two areas of adaptive functioning.
>
> Adaptive functioning means kind of practical intelligence, not on a test, but day to-day life. What can the person do or not do, and how does that interfere with their functioning.
>
> And so you need two areas, two arenas, of functioning that show significant deficits in order to call somebody mentally retarded. And then you have to have an onset of these things before the age of 18....

R. of Crim. Trial, Vol. 34 at 195.

The focus of Dr. Cunningham's testimony was on the first two elements-Hall's IQ score and his perceived deficits in the area of adaptive functioning.[6] Dr.

---

[6] The parties seem to take as a given that whatever mental disability Hall might have had when he and Neville murdered

Cunningham expressed the opinion that Hall is mildly mentally retarded. Hall's full-scale IQ score was 67 on a WAIS-III test conducted by Dr. Cunningham in 2000. Because the ultimate score has a plus or minus three range of error, the score was in the range of 64 to 70. Dr. Cunningham noted that Hall was subjected to an intelligence test at school in 1991, when his score on a WISC-R test was 71, with a plus or minus five margin of error, meaning that the score ranged between 66 and 76. In addition to the IQ tests, Dr. Cunningham based his opinion on extensive information provided to him concerning the environment into which Hall was born and raised and the way Hall conducted himself from a very young age up to his trial. Dr.

Cunningham's evaluation of Hall's adaptive functioning caused him to conclude that Hall had adaptive functioning deficits in several respects.

Dr. Price did not speak with as much certainty as Dr. Cunningham. When asked by the prosecutor if Dr. Price was able to determine whether Hall was mentally retarded, he responded:

> Well, I'm not as convinced that he is as Dr. Cunningham is. He is at that level where it's either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded. It's- it's sort of a judgment call.

Amy Robinson existed before the age of eighteen. When he and Neville committed the murder, he was eighteen years of age, having a birth date of April 6, 1979.

R. of Crim. Trial, Vol. 35 at 196. Dr. Price said that Hall was able to understand the difference between right and wrong, the significance of committing a crime like murder, and what it means to take another person's life, and had the intellectual capacity to make choices.

When Dr. Price interviewed Hall for two hours on February 2, 2000, for a little over three hours on February 3, and for approximately two hours on February 9, Hall was oriented in that he knew who he was, where he was, and the time. Hall was appropriately dressed and had an appropriate appearance. Hall's thought processes were on the topic, logical, and goal centered. He followed the line of questions Dr. Price was asking, and he answered the questions. Hall's thought processes flowed pretty normally. When Hall would think of something to add to the conversation he did so. The conversation Dr. Price had with Hall was a normal conversation. He saw no evidence that Hall suffered from any kind of delusion or any form of hallucination. Hall's emotions seemed normal, though a little on the flat side, but the emotions changed depending on the topic. He found Hall very cooperative, with a good attitude about talking to Dr. Price and the testing Dr. Price conducted.

Dr. Price gave Hall a test that he considered to be an assessment of Hall's adaptive behavior, which resulted in a finding that Hall was in the low average area in terms of his knowledge of adaptive skills and behaviors. The overall impression Dr. Price conveyed by his testimony is that, while Hall is

intellectually challenged, there is doubt that he qualifies as mentally retarded.

The identities of the other witnesses who testified at the punishment phase of the trial, and a synopsis of the testimony of each, are set forth below:

c. *Other Witnesses Called by the State*

(1) *Richard L. Moon, Jr.*

Mr. Moon is a staff photographer for the local daily newspaper. In early March 1998, he went to Eagle Pass, Texas, to cover the news story of the arrest of Hall and Neville at Eagle Pass. He identified an exhibit as a photograph he took of Hall and Neville while there.

(2) *Rodrigo Rodriguez*

Mr. Rodriguez is a police officer for the City of Arlington, Texas. On February 17, 1998, he was dispatched to a location in Arlington, Texas, to investigate a suspicious vehicle and two suspicious persons. When he arrived, he saw two persons who he later learned were Hall and Neville. They told him they were returning a vehicle that they had purchased because they were having problems with it, and they were removing property from the vehicle. He observed that the items included a crossbow, BB guns, .22 shells, C02 cartridges, and two knives. In the beginning, Neville did most of the talking. Hall and Neville indicated to Officer Rodriguez that the items he saw belonged to both of them.

(3) *Thaddeus Corley*

Mr. Corley is a Special Agent with the United States Department of Treasury, U.S. Customs Services. On March 3, 1998, he was dispatched to the port of entry at Eagle Pass, Texas, in reference to Hall and Neville, who had been stopped there pursuant to an outstanding murder arrest warrant. When he arrived, he arranged for a fellow special agent to interview Neville while he, in a separate room, interviewed Hall. He identified himself and informed Hall of his Miranda rights. Hall agreed to discuss the events leading, and related, to the murder of Amy Robinson, and gave the following description:

> He said that he and Neville wanted to become serial killers. They wanted to kill one to five people a week. He said that they wanted to become White Supremacists and only kill blacks. He said that they didn't want to have to beat up, knock out, or drag anybody, so they decided to kill Amy. He said that they went to her house to pick her up, but she was already on her bike on her way to work and they convinced her to go with them to a secluded area. She told them that she would go, but she didn't want to be late for work. So they took her to a secluded area....
>
> ....
>
> He said that Robert Neville got out of the vehicle, went to the bushes. He was in the car with Amy. He told Amy that her father would be upset if he knew that she was out there with him

and that she should go to the bushes with Neville. He said that as she approached the bushes, Neville fired, shot at her with a crossbow, but he missed her. He said that Neville sent her back to the vehicle. He said that he shot at her with a .22, but missed her. He then sent her back to the bushes.

....

Neville shot at her first with his crossbow. When she went back to the vehicle, Hall shot at her with his .22. Then she went back to the bushes, and then Neville shot at her again with his .22.

Q. And did Mr. Hall also tell you that he shot at her with a pellet gun?

A. He said that after she returned to the car, she was on her way back to the bushes and he shot at her, but he missed. He said that Neville missed, but he got-Hall got upset and grabbed his pellet gun, went after her, and shot her in the leg and in the chest. He said that she fell to the ground, started crying, and they-

Q. What did they do? What did he tell you that they did then?

A. He said they stood over her and laughed and she was crying and screaming. He said that Neville got tired of listening to her scream, so he took the .22 and shot her in the chest and then he shot her in the head.

....

A. A couple of days after he killed her, he said that he and Robert Neville returned to the body. He said that he took four or five dollars from her.

Q. Did he say where he took the money from on her body?

A. He said he took it out of her pocket.

Q. Did he say he did anything else?

A. He said that they shot at her some more with the pellet gun and with the .22.

Q. I want to back up just a minute. The day that they killed her, did he say specifically anything about her keys?

A. Yes. He took the keys and threw them in the bushes. She also had a bike-excuse me. She also had a bike, and he took the bike and placed it on the side of the hill.

R. of Crim. Trial, Vol. 33 at 48-52. Hall told Special Agent Corley that he expected to receive the death penalty for his crime.

As Special Agent Corley and Hall started to talk, and Hall started to reminisce about killing Amy, "he kind of went into like a zone"; "[y]ou could see his eyes get a little bit wider"; and, "[h]e became very excited, almost aroused." R. of Crim Trial, Vol. 33 at 50. When asked if he raped Amy, Hall said that he did

not because the body was nasty. Hall described in a general way where the body was located. Special Agent Corley was with Hall approximately one hour.

(4) *Caroline Massey Barker*

Ms. Barker was Amy Robinson's grandmother. She related information about Amy and Amy's disappearance. None of her testimony would have a significant bearing on Hall's mental retardation claim.

d. *Other Witnesses Called by Hall*

(1) *Karen Hall (Gray)*

Ms. Hall is Hall's mother. She related information about her education and background and the educations and backgrounds of her children, Hall, Damon, and Rebecca. Hall was born April 6, 1979. Ms. Hall testified about her marital relationship with Hall's father and her relationships with other men who lived in the home with her and her children from time to time over the years. She described Hall's interaction and relationships with his father and the other men. Ms. Hall described the home environment as Hall was growing up, including unusual sexual activities between her, Hall's father, and other persons who came into the house, which occurred while Hall was present in the house, violence in the home, and alcohol and drug usage by her and others in the house. She told of suffering physical abuse from one of her male friends in front of Hall.

She met Larry Gray in 1994, at a time when Hall was living with his father. In December 1994 Hall returned to live in the home with her and Mr. Gray. Ms. Hall described the home environment after Hall returned to live with her and Mr. Gray, including suicide attempts by Mr. Gray that Hall witnessed. She said that Hall lived twelve different places during the first eighteen years of his life. Ms. Hall said that as a result of the problems in their home, the family received counseling in 1996. She discontinued the counseling in June 1997 because they were "going into [her] childhood and trying to blame everything that's been going on [as her] fault." *Id.* at 114.

Ms. Hall described how in the summer of 1997 Hall withdrew to his room, and was not smiling anymore. He played video games and listened to the stereo, and would be by himself for long periods of time. Hall passed the written part of a driving test, but did not try to take the driving part.

She told of difficulties she had during her pregnancy with Hall. Ms. Hall discussed different times when Hall had an accident of one kind or another that could have resulted in a head injury. She described Hall's history in school. He was in special education classes up through the ninth grade, when Hall's father had him put in regular classes. Hall was unable to handle the regular classes. He was required to have the services of a speech therapist, and took Ritalin from the time he was in the first grade until he was in the fifth grade. Hall went to the tenth grade in public school. She described

things that Hall was unable to do, such as reading the hands on a clock, though he could tell time from a digital watch; using a menu; negotiating public transportation; and using a dinner knife, though he could use a fork and spoon. He sometimes chewed with his mouth open.

She described Hall's mental challenges. He could not count change. Hall had difficulty with directions, and would "get lost real easy." R. of Crim. Trial, Vol. 33 at 125. He was hired as a stocker at Kroger, but they moved him to a sacker position because his hands were so big he could not stack small boxes of JELL-O the way they should be stacked.

Hall did not fit in with people his age. He played as if he were eight years of age, and attracted kids eight, nine, or ten years of age. Children his own age would call him stupid or retarded, which would cause Hall to cry. Younger children accepted him.

Hall became a friend of Neville when they were working together at Kroger in the fall of 1997. She met Neville twice, once at Kroger and once when Neville came to the door with a car, and asked if Hall could come out. At that time, Neville was twenty-three years of age and Hall was eighteen. She did not approve of Hall's friendship with Neville because Neville was older than Hall. Neville would do things with Hall that Hall's father once did, such as taking him to play bingo and shoot pool, and buying a pellet gun for him. Hall was excited about the things Neville did for him.

She taught all of her children how to use pellet guns when Hall was ten years old. Hall did not shoot a pellet gun well. He was not really interested in doing that. Hall enjoyed playing different video games, some of which involved violence. He read and wrote at about a fourth-grade level. Hall read children's books, and had been reading the Bible since he had been in jail.

She would not agree that Hall could express himself, though he could relate an event he experienced. There was a period of time when Hall was not able to distinguish fantasy from reality. That was after a situation with Mr. Gray, his sister, and his father. She was aware of two girlfriends Hall had, but did not know their ages. She met one of them, who was near his age. Hall could use a telephone, and he was involved in church.

Ms. Hall discussed the household chores that Hall performed, including taking care of his room, taking out the trash, cleaning up after the dogs in the back yard, helping her in the kitchen (such as loading the dishwasher), and cleaning up the bathroom. Hall could brush his teeth, shave, change his clothes, and button his shirt. After he quit working at Kroger, he got a job at Winn-Dixie. Hall quit Winn-Dixie because Neville told him that he could get a better job at a place where the two of them could work together.

For about two weeks after Amy Robinson disappeared, Hall stayed at night with Neville at Neville's grandmother's apartment. During that time

Hall came home every day, bringing his dirty clothes, picking up clean clothes, and sometimes picking up video games, magazines, and a VCR. Hall never mentioned to her that the police had contacted him while they were searching for Amy, though he did tell her that Neville had talked to the police.

Her last contact with Hall before he was arrested was when she took him to the Kroger store, where he was to meet Neville. When she dropped him off he told her "I love you," and then went into the store. R. of Crim. Trial, Vol. 33 at 135. When Hall did not return or call her that night, she called the police about Hall being missing. After she reported Hall missing, and the police came to her house to discuss the situation, Mr. Gray's thirteen-year-old son, Aileron, told her about a conversation he had with Hall concerning Amy Robinson. She then called the Arlington police and reported that she thought she knew who killed Amy. At that time she had concern about Hall, thinking that Neville might have killed him. However, Hall did not seem to be afraid of Neville.

(2) *Damon Hall*

Damon was Hall's older brother. His date of birth was March 27, 1975. He discussed his employment and educational background and problems he had with misuse of drugs and alcohol. Damon was asked about things that happened to Hall when he was a child that could have resulted in a head injury. He believed that Hall had problems with respect to how smart he was. Damon was standing behind Hall

when Hall had his Kroger check cashed, and Hall was $10.00 short but did not realize it. Hall's writing was poor, and his drawings seemed childish. He had a difficult time explaining a question. As they were growing up, Damon from time to time would take advantage of Hall by talking him into doing things that were not to Hall's advantage.

Damon described the environment at the house where he and Hall were raised. His father and mother had a fight while Hall was in the house. Hall was a loner, an outcast, and an oddball; and, there were times when he would rescue Hall from younger kids who were picking on him. Hall did not have many friends his own age. Damon had difficulty causing Hall to interact with Damon's friends. His understanding is that Hall had a girlfriend once. When Hall was seventeen he told Damon that he wanted to die, and Damon noticed that he had slash and burn marks on his arm. He discussed how Hall acted when he was on Ritalin.

Damon and Hall had difficulties with their father. They heard their father yelling more than talking. When he and Hall were growing up, he smelled marijuana in the house, and he fussed at his mother because of the odor coming from her bedroom. A son of one of his mother's boyfriends, who apparently stayed with them awhile, antagonized Hall, and Hall would get upset, but would have to be pushed really far before he would retaliate. He discussed a drinking problem that his mother had, which was so bad that he left to go live with his father.

Hall had trouble telling the time, but he could read a digital watch. Hall had a hard time following directions, but he pretty much could follow them if they were given to him slowly.

Damon met Neville once, and it was shortly before he heard that Hall had been arrested. He believed that Neville had significant influence over Hall. He mentioned to his mother that Hall should not be hanging around Neville. Damon noticed that after Hall started being with Neville, Hall did things differently from what he did before. His music changed, his attitude changed, and the video games he played were a lot more detailed and gory.

Damon lived in an apartment with friends for a period of time before Hall left home the final time. When he visited Hall, he noticed that Hall was acquiring more hard-core video games, involving more blood and violence, and Hall seemed to enjoy those games. Also, he saw that Hall was taking an interest in hard-core music, including music containing satanic lyrics. He noticed those things about two or three months before Amy Robinson's murder.

Hall had the telephone number at Damon's apartment, and would call him from time to time, and on occasion Hall would visit with one or the other of Damon's roommates over the telephone. One of Hall's calls to a roommate was on the subject of whether the roommate could get him a gun.

After Amy Robinson disappeared, and before Hall

left with Neville and was later arrested, Damon and several of his friends were at his apartment while Hall was there. Hall was on the couch crying. Damon assumed that the problem was depression from what was going on in Hall's household. His mother's boyfriend, Larry Gray, was having an affair with Rebecca, Hall's sister, and Hall was upset about that. Damon tried to bolster Hall's morale.

The night before Hall and Neville left, Hall spent the night at Damon's apartment, and Damon had a long conversation, about two hours, with Hall. Hall broke down emotionally, and Damon tried to offer encouragement to Hall. Nothing was said about Amy Robinson, who by then had been reported missing. The following morning Hall got up, gathered up his games and everything, and said he was going fishing with Neville, who showed up at the house. That was the last time he saw Hall and the only time he met Neville.

(3) *Ken Trainer*[7]

Mr. Trainer is a school teacher who taught a wood shop class in which Hall participated during the 1995-96 school year at North Garland High School. Hall was a ninth grader in the fall session and a sophomore in the spring session of that school year. Because of the nature of the course he taught, Mr. Trainer often had special-education ("special-ed") students in his class, and has had such students

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[7] Mr. Trainer's name is spelled "Traynor" in the Record of Criminal Trial. The court is of the belief that the correct spelling is "Trainer."

throughout the fourteen years of his tenure as a teacher. He had two or three special-ed students in Hall's classroom. He viewed Hall to be "pretty much as mentally disturbed coming into the class." R. of Crim. Trial, Vol. 33 at 274.

Mr. Trainer had difficulty at the outset teaching Hall some of the simplest tasks, and Hall was frustrated that it took him longer to get things accomplished. Hall wanted to be like any other high school student- "[h]e wanted to get things done, just get it over with and do it now." *Id.* at 275. Even though Hall was frustrated, Hall kept things to himself. He did not see any kind of anger, violence, or anything like that in Hall. Notwithstanding his frustration, Hall would come back to it and get back to work. The students would pick on each other from time to time. If anybody picked on Hall, he would draw back and kind of hide in a shell. He did not consider Hall to be a danger.

Their first class project was to make a baseball bat holder. Normally it took the students two or three weeks to complete the project. It took Hall about eight weeks to complete it. Often Hall simply did not work, instead he just sat at his desk. It took Mr. Trainer a long time to motivate Hall to get him busy and to get him started working on the project. He had to show Hall every step what to do. Sometimes Hall would not remember what he did at a certain step and would have to learn it over again. Hall could not do even the simplest math.

The second class project was to make a flower cart,

which involved spokes on wheels. Hall had difficulty making the preparation for drilling the holes. Hall finished the flower cart project in normal time. Mr. Trainer attributed that to the fact that they were going into the second semester of school, and Hall was seeing other kids working on their own projects that they had designed and were building themselves, and Hall wanted to get on to another project.

Hall was further behind than the other special ed students he had in that class. As time went by, he understood more about Hall. Every task Hall did was simpler to him than the ones before. However, Hall continued throughout to have difficulty in his wood shop work. Hall's final project was a motivation to Hall, and he worked extra time, sometimes after school, in order to do it. At the end, Mr. Trainer saw in Hall a sense of completion with that project-Hall had finally completed something. Mr. Trainer thought that the final project probably gave Hall more motivation than anything-just to be able to complete it and get it built. Hall had pride in his project, and he wanted to get it home and get it working. During the time Hall was working on his final project, Mr. Trainer never had to motivate him because the project was something Hall wanted to build.

Often when Hall came to class, he would seem to be "way outside the classroom altogether." *Id.* at 287. He would come in, stare for a long time, and then put his head down and go to sleep. When he gave Hall instructions, Hall would say that he understood, but

he really did not. Oftentimes his students paired up to get projects done, but Hall stayed pretty much to himself.

Hall did not have many absences from his class, and he normally arrived on time. Hall was appropriately dressed each day, and complied with the rules of conduct for the most part, except on occasions Hall had the idea that he wanted to do it his own way. Hall knew the difference between right and wrong and could follow the basic rules that are necessary to follow in a school society. Hall worked on the wood shop machines like other students. He thought Hall's motor skills were quite adequate. He was pleased, and surprised, with Hall's progress through the school year. Hall had a lot of determination to complete a project, and that is what motivated him. He has had students with backgrounds similar to Hall's who did not reach that point of completion. He was very proud of what Hall did. By the end of the school year he saw that Hall was feeling better about himself and feeling a little bit of pride at the outcome. When Hall responded to Mr. Trainer's inquiries, it would be an appropriate response he could understand.

(4) *Cheryl Kay Conner*

When she testified, Ms. Conner was a self-employed school psychologist, acting as a consultant. Before that she had been a school teacher for twenty-one years. During the 1994-95 and 1995-96 school years she was employed at North Garland High School as a resource teacher and contact-mastery teacher. She

was not acting as a school psychologist at that time. During those two years she was involved in Hall's education as his English, reading, and math teacher for a period of time, and also served as his monitor teacher with the responsibility to monitor his behavior outside classes and to keep up with his attendance and grades. Because of the nature of her relationship with Hall, she probably knew more about him than any other school employee. Hall was a special-ed student.

In Hall's reading class, Hall rarely kept his head up and rarely gave any eye contact; he had a sense of humor, but it was slightly bizarre; he never initiated any communication; and he fell asleep frequently. His reading comprehension probably was on the first-grade level, though he could figure out what the words were in the sense that he could call the words. At the end of Hall's second year he had earned enough credits to be considered a sophomore.

He probably, by use of a pencil and paper, could do math up to a third-grade level, but he could not do multiplication from memory, nor could he do addition or subtraction in his head. She checked his progress every five minutes to keep him on task; otherwise, he would drift off, either begin to sleep or just sit there, do nothing, and stare. He could not write a complete sentence unless he had very frequent prompts from her. When he was instructed to so something, he was not always successful even if there was only one instruction at a time. If he was given two steps in sequence, he could not remember the second step.

Hall attempted to conceal his shortcomings by bragging and boasting. It sounded as if he was repeating things that he had heard previously, and sometimes he would say things that were not appropriate. Because of that conduct, the others in the class ostracized Hall further. He did not even fit in with the other children in the special-ed class. Most of the time when he would try to interact, the things he would say were so bizarre that the other students became upset, and perhaps even angry, but after awhile they just ignored him. Hall very much wanted to fit in, he wanted to please, and he wanted the other students to like him. She observed that Hall was susceptible to being manipulated by other students. Other students teased and antagonized him.

During Hall's freshman year, he had a close friend he did things with. The friend was a boy who was learning-disabled in the sense that he had normal intelligence and just had a learning problem. The friend was the leader between the two.

Hall did not have disruptive behavior. He was always very compliant and tried to please, had no discipline problems, and was always polite and respectful. The only thing noncompliant about his conduct was that consistently in the classroom he slept and did not do his assignments. Reports from Hall's other teachers were that Hall was lazy.

She was concerned that Hall was severely depressed. She wanted to have him tested for depression, but Hall's mother would not permit the testing. Hall's

mother did not want him in a special-ed class; she wanted him put in the mainstream classes. She had several conversations with Hall's father. He probably was one of the most disinterested and negative parents she ever encountered. The last two times she called the father to make a report on Hall's progress, the father told her not to call him any more, that he was not interested and did not care, and that he had washed his hands of Hall and did not want to know anything else.

There was a gap of about six weeks in the spring of 1996 when Hall did not come to school. He told her that the problem was that he had had a fight with his mother because she was drinking too much and that his father was drinking a lot and ignoring Hall. When he returned, his hair was rarely washed, he rarely washed his hands, his clothes were always rumpled and never seemed to be clean, and Hall was very, very depressed. Hall almost looked drugged-he could barely keep his head up and his eyes focused when he was spoken to. Hall told her at that time that his father had kicked him out of the house.

Hall always shuffled-he never picked up his feet. She had to ask him to have eye contact-he always kept his head down and mumbled. Teachers commented that he would talk to himself. He would keep his mouth open, and there were comments from teachers that he drooled. She considered Hall to be a concrete thinker, meaning that if he could not see it, touch it, smell it, taste it, then he had a hard time understanding it. He had a very difficult time with abstract ideas, such as understanding that a day is

part of a year or even that the months went in an order or how many months there were.

She said that if Hall was interested in a task, he would begin it on his own; but, she added, the subjects she had him in, math, English, and reading, were not fun subjects, so he was not interested in starting them. She had the impression that Hall did not ask for help because he did not know how to formulate a question asking for it. He had difficulty with sequential order, such as the sequence of steps necessary to make a peanut butter and jelly sandwich. He could not come up with a plan, such as a plan for working on his assignments. Her impression was that he was very good at playing video games, and enjoyed it a lot. When he would come to school he seemed to be living in a fantasy world like the video games.

He was required to wear glasses, and was subject to punishment if he failed to do so, but he refused to wear them.

Hall did well in a very concrete, structured environment where he knew what the schedule was, what the rules were, and that the rules were consistent. He did not do well in a looser environment where there were options. He rarely stayed on task or made productive use of his time.

On cross-examination by the prosecutor, Ms. Conner disclosed facts that were not developed during the direct examination. As part of an individual assessment done by the Garland school, Hall was

given a TONI, a nonverbal intelligence test, and had an IQ score of 84; and, he tested on the WISC-R with an IQ score of 71. He was classified as learning-disabled, but was not classified as mentally retarded.

Hall would attempt to socialize with females, but they would rebuff him. The fantasies he had were violent, involving injuries to other people. She attributed the fantasies to the video games he played. When he returned from being absent for a period of time, he seemed to have fewer fantasies, but was very, very depressed and more withdrawn than ever-he almost was catatonic.

Reports she received from Mr. Trainer and another teacher, Mr. Bays, who was in the industrial arts area, were very complimentary of Hall, even in Hall's vocational assessment, which showed that Hall's high skills were in the manipulative tasks. Part of the reason for Hall's classification as learning-disabled was that he failed to live up to his potential abilities. She disagreed with an assessment that was made as a result of measures made of Hall's adaptive behavior that his "level of intellectual functioning is consistent with his or her adaptive behavior, with no significant deficits in either area." R. of Crim. Trial, Vol. 34 at 56. That assessment was made by an employee of the school district.

On redirect she explained that the TONI intelligence test usually tests about ten points higher than a WISC, and with some students even higher than that. The WISC is a fairly verbal intelligence measure and the TONI requires no verbal

intelligence. The 71 on Hall's WISC is one point above the dividing line for mental retardation. There is a margin of error in the test results. Depression can affect the outcome of an intelligence test-it will lower an IQ score. She felt that during the two-year period when she was working with Hall, his IQ was declining.

(5) *Chris Bybee*

Mr. Bybee was Hall's math teacher at North Garland High School during the 1995-96 school year. He described Hall as being very quiet, someone who kept pretty much to himself, slow, hard to motivate, not a troublemaker, not tending to be in class discussions, not interacting with other students, and not initiating conversations. He was able to cause Hall to accomplish things when he had a one-on-one discussion with Hall. Hail could not do multiplication or division, but he could do double-digit addition and subtraction, using what Mr. Bybee referred to as stick fingers on paper. Hall never created discipline problems. Mr. Bybee did not witness harassment or taunting of Hall by other students.

He and Hall had some discussions regarding Hall's home conditions. Hall told him that he and his father had a bad relationship, and Hall thought that his father hated him. It was difficult for Hall to follow instructions on academic matters. He guessed, from the work he got out of Hall, that Hall's IQ score would be in the upper sixties. Most of the time Hall seemed to be unmotivated in class. Sometimes he thought that Hall was not giving it enough effort,

that he was giving up too quickly, and that he was lazy. Occasionally Hall slept in his class. Otherwise, Hall's behavior in his class was appropriate, except when on occasion Hall would say something inappropriate to the conversation.

(6) *Tom Mueller*

Mr. Mueller became acquainted with Hall on January 5, 1999, while he was doing jail ministry at the jail where Hall was confined. When Mr. Mueller arrived at the jail on January 5 the jail chaplain gave Mr. Mueller a Bible to take to Hall, explaining that Hall's mother had brought the Bible for him. He took the Bible to Hall, and then ministered to Hall that night. Hall's attitude toward him and the ministry was very positive. He could tell that Hall was very sincere about wanting to learn more about the Lord. Hall told him that he had accepted Jesus Christ as his Lord and Savior, and that he knew that Jesus had forgiven him for his sins and that some day he would be with Jesus in heaven. Mr. Mueller could tell that Hall was very sincere and honest, and he was very open with Mueller.

When Mr. Mueller was preparing to leave Hall on that first visit, after having been there more than an hour, Hall asked him if he could pray for Mueller, and when Mueller consented, Hall did so. For a period of three or four months he saw Hall every Tuesday night. There were three or four different inmates with Hall during the time he was seeing Hall, and each of the other inmates told him what a blessing it was to have Hall with them because they

would pray and study the Bible together, and Hall would help them work through their problems. Hall was ministering to the other prisoners.

His reaction to Hall was that Hall was not the brightest person, and had a hard time reading and sometimes had a hard time putting things together, but Hall did put together that he knew who Jesus Christ was, he knew he was forgiven, and he knew that someday he would be in heaven.

He sometimes helped Hall find verses in the Bible. Hall told him on numerous occasions that he hoped someday he would have a chance to meet Amy Robinson's parents and ask for their forgiveness. Hall was very sorry for what he had done.

e. *Witnesses (in Addition to Dr. Price) Called by State on Rebuttal*

(1) *Alan Boles*

Mr. Boles, who was eighteen years of age, worked with mentally challenged children for City of Arlington, Texas, where he had been employed for six months. From August 11, 1997, until sometime in September 1999 he was employed at a Kroger store, where he became acquainted with Hall. He worked with Hall three or four days each week. Hall trained Mr. Boles to do his job as a courtesy clerk, bagging groceries and taking them out to the customer's vehicle. Hall explained to him the proper way to sack groceries, such as not putting chemicals and cleaning samples in with the food products, to double-bag the heavy items, and that sort of thing. Hall was able to

give him those instructions and to demonstrate to him how to sack the groceries.

He worked with Hall for six or seven months. Mr, Boles did not notice anything slow about Hall while he was working with him. He also worked with Amy Robinson. She was not as quick mentally or physically as Hall. He liked Amy, and is angry toward Hall for what he did to her.

(2) *Monica Zepeta*

Ms. Zepeta was employed at a restaurant in Castroville, Texas, in February 1998. In late February or early March 1998 Hall and Neville came into the restaurant between 8:45 and 8:50 p.m. to have dinner. She gave them menus, and both appeared to read their menus. Neville ordered for himself, and Hall separately ordered for himself. Hall's order was different from Neville's.

She served with their meals a steak knife and two forks. She did not see Hall picking up his food with his hands. He was using proper eating etiquette. While they were in the restaurant they were laughing and having a good time. They flirted with her and tried to encourage her to go to their room to have drinks and then to show them the town.

As they were leaving, Hall asked her for a date the following morning. She agreed, but she did not actually plan to be there. Later that evening, Hall called her on the house phone, and encouraged her to come to the room and have drinks with him. She declined. The next time she saw Hall and Neville

was when she saw them on TV following their arrest.

(3) *Richard Daniel Nutt*

Mr. Nutt is an officer with the City of Arlington Police Department. He was involved in the investigation of Amy Robinson's death. After Hall and Neville were arrested in Eagle Pass trying to cross the border into Mexico, he went to Eagle Pass with his partner for the purpose of interviewing Hall and Neville.

When Hall was given his Miranda warning, he looked Officer Nutt in the eye and told him he understood. Hall agreed to be interviewed. As Hall gave his statement another Arlington Police Department employee who was present typed what Hall related. The interview lasted one hour and fifty-one minutes. After the interview, Officer Nutt read the statement to Hall and made needed typographical corrections. Hall appeared to understand what was being said. He initialed each page at the top and bottom. The typewritten statement was read to the jury. It relates basically the same facts, but with more detail, that Hall related to Special Agent Corley. *Supra* at 18-20.

2. *Pertinent Parts of the Court's Charge to the Jury at the Punishment Phase of Hall's Trial*

Hall's case at the punishment phase was submitted to the jury on three special issues. The one pertinent to Hall's mental disability claim was Special Issue Number 3, which was worded as follows:

> Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Clerk's R., Crim. Trial, Vol. 3 at 238. The jury was instructed that they could not answer Special Issue Number 3 "Yes" unless ten or more jurors agreed, and that they could not answer it. "No" unless they were in unanimous agreement. *Id.* at 234. The jury was further instructed that it need not agree on what particular evidence supported an affirmative finding on Special Issue Number 3, and that in deliberating on that issue the jury should consider mitigating evidence to be evidence that a juror might regard as reducing Hall's moral blameworthiness. *Id.*

3. *Arguments by Counsel at Hall's Trial Directed to the Issue of Mental Retardation*

After the conclusion of the evidence and after the court's charge was read to the jury, counsel for each side presented a jury argument pertinent to Hall's mental retardation contention. The focus of the argument pertaining to Hall's mental capabilities was Special Issue Number 3. Defense counsel strongly urged the jury that they should answer Special Issue Number 3 in favor of Hall based on the evidence of his mental disability, particularly the evidence that he is mentally retarded. R. of Crim.

Trial, Vol. 36 at 39-47.

4. *The Jury's Verdict*

The jury answered Special Issue Number 3 "No." Clerk's R., Crim. Trial, Vol. 3 at 238. Put another way, each of the twelve members of the jury concluded that none of the evidence that Hall was mentally retarded, or otherwise mentally challenged, established a sufficient mitigating circumstance to warrant imposition of a sentence of life rather than death. However, the jury was not asked to decide whether Hall was mentally retarded, nor was it given in the court's charge a definition of mental retardation.

C. *State Court Habeas Proceedings*

1. *General*

On January 17, 2002, Hall filed an application for writ of habeas corpus in the state court, asserting as his first claim for relief that he is mentally retarded and that the Eighth Amendment to the United States Constitution would be violated if he were to be subjected to the penalty of death. Clerk's R., St. Habeas, Vol. 1 at 8. The definition of mental retardation Hall suggested in his application is basically the same as the one to which Hall and respondent stipulated at the commencement of the December 10, 2008, hearing. *Id.* at 11.

2. Evidence Made a Part of the Record of Hall's State Habeas Proceedings

a. *Affidavits Filed with Application*

Hall's application was supported by six affidavits, which were summarized in his application as follows:

(1) *Sally Church, Ph.D.*

> Dr. Church is a Ph.D. psychologist with extensive training and experience in matters concerning mental health and mental retardation. She has performed numerous psychodiagnostic evaluations and assessments.
>
> With regard to this case, Dr. Church has reviewed Applicant's family history; Applicant's school, medical, employment, jail, and prison records; previous psychological evaluations performed on Applicant; investigation reports; the testimony from Applicant's trial and witness affidavits. She has also conducted a psychodiagnosic evaluation of Applicant at the Polunsky Unit of the Texas Department of Corrections.
>
> Based upon her review of documentary evidence and her psychodiagnostic evaluation of Applicant, Dr. Church's professional opinion is that Applicant is mentally retarded. The most recent testing places Applicant's I.Q. at 67, and this score is consistent with previous intellectual testing. Dr. Church is able to state that, based on this I.Q., ninety-eight percent (98%) of the population operates at a higher level of intellectual

functioning. Thus, Applicant is significantly subaverage.

Further, in Dr. Church's professional opinion, Applicant has critical deficits in his adaptive skills and behavior. In fact, Dr. Church believes that it is "highly doubtful that he alone could meet the needs of his da[y] to day life."

Finally, based on the reported history and documentation, Applicant has suffered from mental retardation since a very early age, if not from birth. Thus, his condition originated during the developmental period.

In addition to her diagnosis that Applicant is mentally retarded, Dr. Church notes that Applicant's physical appearance is typical of a person who suffers from Fetal Alcohol Syndrome or Fetal Alcohol Effect. It is entirely possible that Applicant suffers from one of these conditions as there is evidence that Applicant's mother was an alcoholic. Either of these conditions would be a correlate of Applicant's mental retardation.

Also, Applicant exhibits characteristics consistent with genetic disorders such as XXY, Kleinfelter Syndrome, YYX, Extra Y Chromosome, or Fragile X Syndrome. All of these disorders are usually related to mental retardation and are present at the time of birth.

By way of explaining the fact that Applicant will appear, at first blush, to be much more intelligent than he actually is, Dr. Church states that,

> [Applicant]'s main motivation is not to [appear] to be a 'dummy' in order to mask his deficits. He tends to say what he has heard others say and/or to say what he thinks others want or expect him to say. This is not at all unusual as a coping mechanism for the Mentally Retarded person.
>
> Clerk's R., St. Habeas, Vol. 1 at 11-13.

(2) *Bill Coble*

Mr. Coble resides in the cell immediately adjacent to Applicant's cell on death row at the Polunsky Unit. Mr. Coble has known Applicant since Applicant arrived on death row. Mr. Coble has never read anything about Applicant's case and has not been made privy to the findings of the experts who have evaluated Applicant to determine if he is mentally retarded or the standards for determining if Applicant is mentally retarded.

According to Mr. Coble, Applicant is referred to as "half-deck" by the guards and other inmates on death row. The reason for this nickname is Applicant's obvious lack of intellectual functioning. Indeed, Mr. Coble has had the opportunity to know both Applicant and Johnny Penry, and believes that Applicant is "worse off" than Penry.

Mr. Coble has to supervise all of Applicant's correspondence for him. In other words, Mr. Coble writes answers to letters for Applicant, and then Applicant copies the letters in his own handwriting. It takes "weeks" for Applicant to copy a letter that Mr. Coble gives him. Further, Mr. Coble tries to

teach Applicant new words, but he has to tell Applicant the meaning of those words over and over, and Applicant "never really seems to get it."

As an example of Applicant's inability to grasp simple concepts, Mr. Coble once told Applicant that he was "putting the cart before the horse." Applicant did not understand that saying at all. Mr. Coble explained the saying to Applicant a couple of times, but when Mr. Coble inquired if Applicant understood it two or three days later, Applicant did not know.

Mr. Coble's observation is also that Applicant is wholly lacking in "street smarts." As an example, Applicant does not understand how to buy items from the commissary, i.e., he does not understand what items cost and how much money he would have to have to purchase them. As another example, Mr. Coble has to constantly remind Applicant to wash himself, to shave, to clean his food container, and to clean his cell.

Mr. Coble also believes that Applicant has other mental problems that exacerbate his retardation. Applicant often appears "depressed" or "spaced out." Also, Applicant "watches" television by tuning his radio to the television band. During these times, Applicant will listen to the cartoons and "laugh just like a little kid would." Sometimes, Applicant talks back to the cartoons. Applicant describes this activity to Mr. Coble as "watching t.v." and says that he "can see the cartoons in his head."

Mr. Coble has also had the opportunity to observe that Applicant does not understand his case. For example, Applicant received notice that he was being sued civilly by the injured party's family. Applicant became very upset because he was afraid they were going to take him back to Fort Worth and that he would "get another death penalty." Mr. Coble does not try to explain the legal proceedings to Applicant as Mr. Coble sees that as the job of Applicant's attorneys.

Id. at 13-15.

(3) *William S. Harris*

Mr. Harris was one of Applicant's appointed attorneys at trial. Even prior to his appointment to represent Applicant, Mr. Harris was aware of Applicant's mental limitations. Based upon his meetings and conferences with Applicant, Mr. Harris "concluded that his [Applicant's] mental limitations were very severe." Mr. Harris obtained a professional opinion from Mark Cunningham, Ph.D., a forensic psychologist, who diagnosed Applicant as mentally retarded. Based upon his observations of Applicant, Mr. Harris believes that Dr. Cunningham's diagnosis is accurate.

According to Mr. Harris, Applicant was unable to grasp the legal concepts applicable to his case (such as the law of parties or eligibility for probation) no matter how many times or how simply and clearly Mr. Harris explained them to him. However, demonstrating his desire to mask his mental

retardation, Applicant would tell Mr. Harris that he understood and then immediately call and ask the same questions over and over again. Mr. Harris would again explain the situation to Applicant, who could never truly grasp what he was being told.

Mr. Harris also observed Mr. Hall's lack of functioning in regard to understanding how the world works. Mr. Hall would sincerely request that his case be moved to Hawaii, because he thought the food would be better. In another incident, Mr. Harris was having difficulty getting Applicant a new pair of glasses. Applicant asked if, since he could not get the glasses, he could have lasik surgery. It was obvious to Mr. Harris that Applicant neither understood the expense of such a surgery or that it would be more difficult to get the surgery than getting a new pair of glasses.

During jury selection, Applicant objected to being present, stating that he did not understand what the participants in the court room were saying and that he was "like a blind man in a room full of people who could see." Mr. Harris interprets this statement as follows: "Just as a blind person need never have had sight to understand that he is missing a sense most people have, so a retarded person does not have to have high intellect to know he does not understand what everybody else grasps."

While he does not remember every example of Applicant's obvious lack of intellectual ability and functioning, Mr. Harris knows that he "frequently

made the comment to others during my dealings with [Applicant] that the average person does not realize how breathtakingly profound the mental limitations of one who is, as [Applicant's] I.Q. test showed him to be, in the bottom 2 percentile of the population...." Further, representing Applicant made Mr. Harris "profoundly aware of how limited his mental capacity is and how unjust it is to indulge in the fiction that he has an adult capacity to understand his actions or their consequences."

Id. at 15-17.

(4) *Paul A. Conner*

Mr. Conner was Applicant's other appointed attorney at trial. Upon his first meeting with Applicant, Mr. Conner was "struck by the low level of mental capability he exhibited." Mr. Conner's subsequent dealings with Applicant, "only enhanced [his] belief in [Applicant's] low I.Q."

During their first meeting, Applicant explained things to Mr. Conner in a manner that reminded Mr. Conner of a child. In response to Mr. Conner's questions, Applicant used his fingers to represent people and "walked" them to describe their actions.

Although Applicant would consistently accept explanations and instructions from Mr. Harris and Mr. Conner, the extent of his lack of understanding would be profoundly demonstrated by asking the same question within days, or sometimes within hours or minutes, of the explanation.

Mr. Conner noticed that Applicant would attempt to "mask" his retardation by not asking questions. Mr. Conner states that Applicant "bitterly did not want people to think him 'dumb.' " Applicant would sometimes appear to be surprisingly well informed on a topic, but as the discussion would continue, it would become apparent to Mr. Conner that Applicant was "parroting" words and phrases that he had heard. In these situations, further inquiry would normally reveal that Applicant had a complete lack of understanding of the words he was using or, at best, only a rudimentary grasp.

Mr. Conner describes Applicant as "child-like" in his understanding of his arrest and the ramifications of the charges against him. He continually asked why he could not go home, and did not appear to understand his attorneys' explanations of bail. Mr. Conner also remembers Applicant requesting to have the venue of his case changed to Hawaii so that "he could see it, since he had never been there."

Id. at 17-18.

(5) *Joseph D. Ward*

Mr. Ward is a private investigator who has been appointed to assist in the preparation of this Application. He has met with Applicant at the Polunsky Unit. Based on his conversations with Applicant, it is clear to Mr. Ward that Applicant did not understand anything about his appeal. Mr. Ward noticed that Applicant will "agree with or go

along with whatever" Mr. Ward wanted Applicant to say. Further, Mr. Ward states that Applicant's ability to understand their discussions is significantly diminished from other people his age. Mr. Ward describes Applicant's demeanor as "childlike."

During one interview, for which another investigator, John Ladd, was present, Applicant was asked about the circumstances surrounding his arrest and the videotaped statement that he gave in Eagle Pass, Texas. Applicant was "completely unable to recall or relate those events in any meaningful way." Despite the fact that they had just identified themselves, Applicant could not remember Mr. Ladd's name or Mr. Ward's name.

Based on his discussions with Applicant, Mr. Ward notes that Applicant often uses words inappropriately and pronounces them incorrectly. Mr. Ward believes that Applicant does this in an attempt to mask his mental retardation.

In conclusion, Mr. Ward does not feel that Applicant has the ability to assist with his defense in any meaningful way and does not see any evidence indicating that Applicant is able to take care of himself without the continual help of those around him. Accordingly, Mr. Ward questions whether Applicant fully understands the consequences of his actions or what it means to be executed.

Id. at 18-19.

(6) *John Ladd*

Mr. Ladd is a private investigator who has been appointed to assist in the preparation of this Application. He has conducted one interview of Applicant at the Polunsky Unit. During that interview, it became apparent to Mr. Ladd that Applicant "was not fully capable of understand[ing] what has happened to him or why." Applicant was unable to remember very much about the details of his arrest or the video taped statement that he gave in Eagle Pass, Texas. At one point during the conversation, Applicant believed that Mr. Ladd was one of the detectives who questioned him in Eagle Pass.

It was very clear to Mr. Ladd that Applicant has a very short attention span. Mr. Ladd describes talking to Applicant as "almost like talking to a 6 or 7 year old child." Further, Applicant "clearly did not understand most of the questions I asked him."

Applicant also showed his limited adaptive functioning when he described that he gets "extra food" by saving portions of his meals to eat late at night. According to Mr. Ladd, Applicant felt that he was very clever in getting this "extra" food, but failed to recognize that it was his own food that he was saving.

In conclusion, Mr. Ladd does not believe that Applicant was able to assist in his own defense or understand the nature of the charges against him.

Id. at 19-20.

As part of the evidence in support of his application, Hall incorporated by reference all of the testimony from his trial, during both the guilt/innocence phase and the punishment phase. *Id*. at 20.

b. *Affidavits Filed by State in Reply*

Before the State replied to Hall's state habeas application, the Supreme Court handed down its June 20, 2002, decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The reply filed by the State on July 16, 2002, took into account the *Atkins* decision. The State submitted with its reply affidavits of Dr. Price, Brandon Daniel, Julie Perego, Suzanne Prosperie, Todd Raymond Tatum, and Darrell J. White. A summary of pertinent information provided by those affiants follows:

(1) *Dr. Price*

Dr. Price repeated information he provided in his trial testimony. The definition he gave for mental retardation basically is the same as the one to which the parties stipulated in this action. Clerk's R., St. Habeas, Vol. 1 at 121, ¶ 3. He opined that "[w]hile there is no question that Michael Hall has had learning problems throughout his life, his intelligence test results do not clearly place him in the range of mild mental retardation" and that "[i]t is very important to know that Michael Hall was placed in special education due to having been classified as having a learning disability-not mental retardation." *Id.* ¶ 4. He reiterated that his "review

of this case does not clearly indicate that Michael Hall is mentally retarded." *Id.* Dr. Price added that based on his review of the records and the administration of tests related to Hall's knowledge of adaptive behavior, his opinion was that "Hall was a poor student but that he does not have significant adaptive deficits." *Id.* at 122, ¶ 6. Finally, Dr. Price explained that "the use of mental age to describe the functioning of an adult is not an accepted practice in psychology." *Id.* ¶ 7.

(2) *Brandon Daniel*

Mr. Daniel was employed as a prison guard at the prison unit where Hall had been confined since he was given the death penalty. He said that Hall acted as normal as anyone in his pod; he saw Hall talking to the other inmates and joking or having conversations with them; he had been around people who are slow mentally, but he had not seen that in Hall; he had not seen any unusual behavior on the part of Hall; he had observed Hall playing basketball and talking with other inmates; he had heard Hall play rock and roll or heavy metal music on his radio; he had not had any indication that Hall did not understand how to obey orders and follow the rules; based on his observations, Hall was just a normal inmate. *Id.* at 123-24.

(3) *Julie Perego*

Ms. Perego was another prison guard at the prison facility at which Hall has been confined. She said that Hall became angry at times if they woke him too

early; she had seen nothing unusual in Hall's conduct, different from the other inmates; Hall's behavior was normal, and he did what he was supposed to do; she never had to tell Hall what to do more than once; she had been in the unit where Hall is confined since June 2001, and had been around Hall at different times. She never saw anything that would make her think Hall was mentally retarded, and he seemed pretty normal to her. *Id.* at 125-26.

(4) *Suzanne Prosperie*

Ms. Prosperie was another guard employed at the prison facility where Hall has been confined. She said that she had been employed there a total of about four years; she saw Hall on the average of about two days a week; Hall was just a normal inmate to her; when Hall was angry he would complain about things he did not like, and threatened to write grievances; Hall socialized with other inmates, and there was nothing unusual about Hall's conduct or attitude; based on her dealings with Hall, he clearly and definitely knew the difference between right and wrong; Hall complained and argued, but he obeyed the orders of the guards; Hall complained about being subjected to strip searches, and threatened to write a grievance; his cell was filthy, but by his choice; she did not see any sign of mental retardation or illness in Hall; Hall appeared at times to be depressed, as would be expected from a person on death row; she had experience with mental retardation because one of her neighbors has a mentally retarded daughter; Hall learned the system and understood the rules; Hall functioned and coped

as well as the other inmates; she caught Hall trading property with another inmate, which was a violation of the rules, and Hall knew that it was wrong and stopped when ordered to stop; she never heard Hall referred to as "Half-Deck" by anyone; and, Hall managed very well in prison. *Id.* at 127-29.

(5) *Todd Raymond Tatum*

Mr. Tatum was another employee at the prison unit where Hall is confined. He was around Hall about three months, and saw him on a regular basis. He had the usual contacts and conversations with Hall and observed nothing unusual; Hall was never belligerent, and was always obedient with him; Hall's hygiene was not the best; Hall understood what was right and wrong and should be held accountable for his conduct like any other inmate; Hall was kind of a loner, but he was not crazy or unusual as an inmate; Hall learned the system and understood what he was doing; Hall was very capable of functioning and coping like any inmate; he knew kids in school with Down's Syndrome, but he had not seen anything at all that indicated Hall was mentally retarded. *Id.* at 130, 188.

(6) *Darrell J. White*

Mr. White was another employee in the prison unit where Hall is confined. He said that he had worked around Hall for about three months; in a normal workday, he checked the inmates every thirty minutes, and Hall would be doing normal things that inmates do in their cell; he did not observe any

unusual conduct on the part of Hall; Hall obeyed orders and followed rules; Hall was just a normal inmate; he did not have problems with Hall, failing to understand anything that he told him to do; Hall showered, brushed his teeth, and did the normal things; Hall played basketball and got along with other inmates at recreation. *Id.* at 132. He had experience with an uncle who was mentally retarded, and Hall was nothing like his uncle, who he repeatedly would have to tell what to do; he had seen nothing about Hall to cause him to think that Hall was mentally retarded. Other than being very quiet, Hall was like any other inmate. *Id.* at 193.

c. *The Report of Dr. Cannon*

The record of the habeas proceeding contains a December 20, 1999, letter from Mary L. Cannon, M.D., a forensic psychiatrist, to the judge presiding over Hall's criminal trial advising that on December 17, 1999, she completed a psychiatric evaluation of Hall to determine his competency to stand trial. Clerk's R., St. Habeas, Vol. 2 at 322-23. Based on her review of Hall's past history, his medical history, and a mental status examination, her opinion was that Hall has a factual as well as a rational understanding of the charge against him and sufficient mental ability to consult with his attorney with a reasonable degree of rational understanding.

She described Hall as neat, clean, and dressed in jail clothes when she saw him on December 20, 1999, and said that he was pleasant and cooperative, made good eye contact, and appeared to be alert. Hall was

able to tell her his charge, details of the event related to his charge, and the circumstances of his arrest. His mood was slightly depressed, and his affect was appropriate to his mood. While his thought productions were slow at times, they were simple but logical and goal-oriented. She found no evidence of delusions or auditory hallucinations.

Hall did very well on the Proverbs and Similarities tests. His memory appeared to be only fair. He could perform only two of the four basic elementary mathematical functions. On theoretical questions, Hall's judgments were good, and his general fund of information was fairly good. He was oriented as to time, place, person, and circumstances.

Dr. Cannon concluded her letter by saying "[w]hile there is no doubt that Mr. Hail may have a learning disability, he did surprisingly well on the mental status examination and presented his case regarding his charge very well." *Id.*

d. *Affidavits Filed by Hall on September 20, 2002*

On September 20, 2002, Hall filed more affidavits in his habeas action responding to the State's reply affidavits. The following is a brief description of the contents of Hall's newly filed affidavits:

(1) *George Carl Denkowski, Ph.D.*

Dr. Denkowski is a psychologist who practices his profession in Fort Worth. He has been working with the mentally retarded since 1975. He often conducted evaluations of adults thought to be mentally

retarded. Hall's case was Dr. Denkowski's second case involving an appeal of a death penalty on the basis of mental retardation. He found in the other case that the defendant was not mentally retarded. He was retained by Hall's counsel to determine if Hall is mentally retarded under applicable standards. His opinions were based on a review of records provided to him by Hall's counsel.

His opinion was that Hall is a mentally retarded person. He explained the bases of his opinion in a general way as follows:

> His Wechsler Full Scale IQ has consistently fallen below 75, and his adaptive behavior has been significantly deficient across his life-span. It is therefore apparent that this disabling syndrome originated in the developmental period of life. Within the context of the standards of professional practice applicable in Texas, it is therefore clear that Mr. Hall meets diagnostic criteria for mental retardation.

Clerk's R., St. Habeas, Vol. 3 at 605.

Dr. Denkowski's affidavit is nineteen pages long. In much the same way that a lawyer would present a case in a brief, Dr. Denkowski presented, based on the contents of the records he had reviewed, his arguments as to why his conclusions were correct. He expressed his understanding of the standard to be applied in Texas for determining whether a person is mentally retarded to be the following:

1. The *WAIS-III* full scale IQ must be below 75;

2. Significant adaptive behavior deficits must exist in three skills areas and the measurement error adjusted standard score for the overall instrument must be below 71; and

3. These impairments must have originated prior to the 18-22 age range.

Id. at 610.

Dr. Denkowski took issue with virtually all of the evidence that had been presented by the State in support of its contention that Hall was not mentally retarded. He concluded his affidavit with the following explanations:

Analysis of the intellectual and adaptive behavior functioning data available on Mr. Hall, including proper accounting for measurement error and for the measurement quality of applied instruments, compels the conclusion that he is a mildly mentally retarded person. His Wechsler IQ has been under 75 from at least early adolescence, and he has manifested serious deficits in adaptive behavior since at least late adolescence. Relatedly, there exists no realistic basis for believing that these serious functional impairments do not persist to this day-they may not be evident to the casual observer since Mr, Hall is being maintained in an extremely structured environment. And finally, it seems plain that this cumulative disability originated in the developmental period of life. Accordingly, *it is clear that Mr. Hall meets the diagnostic criteria for mental retardation in accord*

with applicable standards of practice that apply in Texas.

Id. at 621.

(2) *William S. Harris*

Mr. Harris, one of Hall's trial counsel, became convinced during his representation of Hall that Hall was mentally retarded. He supplemented his January 2002 affidavit with discussions of events during Hall's trial related to the defense efforts to establish that Hall was mentally retarded and of the difficulty he had working with Hall because of Hall's mental limitations. The affidavit is in the nature of legal arguments by counsel. *Id.* at 635-37.

(3) *Stephen Dollar*

Mr. Dollar was an attorney practicing with a law firm in Dallas. Before he became a lawyer he was a school teacher. He taught Hall world history in the 1995-96 school year at North Garland High School. Hall was enrolled in the special education program, and was authorized to go to an alternative classroom setting for his testing and assignments; however, Hall chose not to take advantage of that opportunity. He rarely left Mr. Dollar's classroom. Hall was unable to follow Mr. Dollar's daily instructions or complete the assignments. Mr. Dollar said that Hall displayed no cognitive ability in his classroom., and, in Mr. Dollar's opinion, demonstrated behaviors similar to those of a child with a diagnosis of mental retardation. He gave examples of conduct of Hall that caused him to have that opinion.

Hall would not respond to his own name when called upon, he would sit in the back of the classroom, stare out the window, and drool from his mouth for most of the class hour; he could not read; he could not accomplish even the most menial of tasks, even when they were simplified to accommodate his special education needs; he could not spell his own name; he demonstrated extreme difficulty speaking complete sentences; he had to be woken frequently due to his tendency to fall asleep at his desk during the classroom hour; he was unable to identify his history book from his math book.

Hall had minimal family support. Mr. Dollar spoke to Hall's female caregiver on one occasion. When he told her of his concerns regarding Hall's lack of cognitive skills, her response was to "just hit him a few times as that was how she controlled his behavior." *Id.* at 638. Hall seemed to have no friends and often was the object of ridicule by his fellow students. He believed that Hall was absent of emotion and definitely was a follower. When other children in the class would act out, Hall would mimic them. Nevertheless, Hall was neither disruptive to his classroom, nor did he exhibit any physical or verbally aggressive behavior. Mr. Dollar said that he did not feel that Hall was capable of improving or learning at a normal level due to his obvious mental impairment.

(4) *Lilli C. Hallam*

Ms. Hallam was a Project Coordinator for the ARC of Dallas's Mental Retardation and Justice Information

Initiative. She has a master's degree in counseling. She discussed mental retardation in a general way. According to her, it would be difficult, if not impossible, to fake mental retardation. Eighty-seven percent of the persons considered to be mentally retarded have mild mental retardation. Their IQ scores fall in the range of 50-70. Persons with mild mental retardation often live in the community and attend school, and, with support, are able to hold jobs and manage their finances. Ms. Hallam described the challenges experienced by persons with mild mental retardation. They are not always easily recognized because they have learned to "blend" or "pass" as non-disabled. She provided with her affidavit the American Association of Mental Retardation's tenth edition of *Mental Retardation Definition, Classification, and Systems of Support.* Clerk's R., St. Habeas, Vol. 3 at 640-42.

(5) *Judith Bristow (Custodian of Records of Baylor Medical Center at Garland)*

Ms. Bristow authenticated with her affidavit twenty-six pages of records of Memorial Hospital of Garland pertaining to Hall's birth there in April 1979 and treatment he received there in September 1995 as a result of an abrasion to his mouth and lip when he fell on the sidewalk from his bike. Clerk's R., St. Habeas, Vol. 4 at 883-909.

(6) *Alicia Richards (Custodian of Records of Benjamin Franklin Middle School, Dallas Independent School District)*

Ms. Richards authenticated by her affidavit two pages of records pertaining to Hall's attendance at Benjamin Franklin Middle School of Dallas Independent School District during the 1993-94 school year. *Id.* at 910-12. They appear to show that he was withdrawn from the school on January 31, 1994, with a zero grade-point average and no credits.

(7) *Betty Pratt (Custodian of Records for Arlington Independent School District)*

Ms. Pratt authenticated six pages of records of Nichols Junior High School of Arlington Independent School District. *Id.* at 913-18. They show that Hall attended school there for a period of time starting in December 1994. He received three credits for his studies. Apparently he was withdrawn from the school on February 21, 1995, while he was in the ninth grade.

(8) *Annette Ervin (Custodian of Records for Mental Health Mental Retardation of Tarrant County)*

Ms. Ervin authenticated records of Mental Health Mental Retardation of Tarrant County, Texas, pertaining to Hall. *Id.* at 920-37. The records show services rendered to Hall while he was an inmate in Tarrant County Jail prior to his criminal trial. The final entry in the record, dated February 17, 2000, indicates that Hall's problems were related more to being in administrative segregation than issues of chronic severe mental illness.

(9) *Sally Church, Bill Coble, Paul A. Conner, William S. Harris, John Ladd, and Joseph Ward*

The affidavits of Dr. Church, Mr. Coble, Mr. Conner, Mr. Ladd, and Mr. Ward and one of the affidavits of Mr. Harris that were filed on September 20, 2002, are copies of affidavits that accompanied Hall's January 17, 2002, habeas application.

(10) *Miguel A. Omana, Jr. (Custodian of Records for Maverick County Sheriff Department)*

Mr. Omana authenticated the records of the Maverick County Sheriff Department pertaining to Hall's stay there commencing March 4, 1998, following his arrest. *Id.* at 954-82.

(11) *James R. Zeller*

Mr. Zeller, the senior warden in the prison unit where Hall has been confined, authenticated records of that unit pertaining to Hall. Clerk's R., St. Habeas, Vol. 4 at 983-1075.

(12) *Joyce Parmenter (Custodian of Records of Health Records Maintained at the Prison Unit Where Hall is Confined)*

Ms. Parmenter authenticated by her affidavit the health records of the prison unit where Hall has been confined. *Id.* at 1075-113. A Mental Health Assessment form dated July 29, 2002, did not indicate that the evaluator observed anything inappropriate about Hall's conduct. *Id.* at 1081. Hall's personal hygiene was observed to be neat and clean; his cell hygiene was observed to be neat and orderly; he was shown to be oriented as to date, time, and place; his thought process was shown to be

coherent; his thought content, speech rate, speech volume, and mood were shown to be normal; his attitude was shown to be cooperative; and, his behavior and attention span were shown to be normal. Basically the same findings were noted in a Mental Health Assessment form completed on May 2, 2002. *Id.* at 1082.

Hall was given a TONI-III test of nonverbal intelligence in March 2000, which resulted in a score of 77. *Id.* at 1086.

(13) *Jerry W. Halpin (Custodian of Records for Garland Independent School District)*

Mr. Halpin authenticated by his affidavit Garland Independent School District's records pertaining to Hall. *Id.* Vol. 5 at 1114-1479.

The records show that a WISC-R intelligence test performed on Hall in October 1991 determined that his intellectual functioning was in the borderline range of ability, with a full sale IQ score of 71. *Id.* at 1436. An individual assessment dated October 29, 1991, said that Hall's "performance on the WISC-R [performed 10/8/91] indicates that his/her assessed intellectual ability is above the mentally retarded range." *Id.* at 1440. As a result of an evaluation of Hall made in 1994, his TONI-2 Quotient was 84 and his adaptive behavior was described as follows:

> The student's adaptive behavior was assessed using informal measures. Results showed that the student's level of intellectual functioning is consistent with his/her adaptive behavior, with no

· significant deficits in either area.

Id. at 1332. A form dated November 30, 1994, states that "[Hall's] performance on the standardized intelligence test indicates that [his] assessed intellectual ability is above the mentally retarded range." *Id.* at 1463.

An observation record dated November 30, 1994, when Hall was in the ninth grade, noted that Hall is poorly motivated, did not complete tasks, was easily distracted, and attempted but failed tasks; that frequently Hall was easily frustrated, slow to start assignments, could not remember directions or facts, had difficulty making friends, had difficulty in understanding spoken language, and that occasionally he was excessively shy. *Id.* at 1239. Similar observations are noted throughout the school records. As examples, a report dated May 5, 1994, indicated that Hall's failing grades in English resulted from tutorial non-attendance, non-completion of assignments, inattentiveness, student apathy, and low test grades; a December 7, 1995, report showed that Hall's failing grades in Spanish appeared to be the result of non-completion of assignments, inattentiveness, student apathy, and low test scores; the report of Hall's 1994 evaluation said that based on assessment data, Hall "demonstrates significant academic or developmental deficits in the area(s) of: reading, spelling, and math," *id.* at 1333, and stated that Hall appears to meet specific eligibility criteria for a learning disability, icL, and that Hall "can be expected to meet the district's regular criteria for receiving

passing grades and maintaining extracurricular activities," *id.* at 1336.

Interspersed throughout the school records are comments from teachers suggesting that lack of attention, sleeping in class, and simply refusing to do his work were significant parts of Hall's problem. An exception is a report by Ms. Conner, made at the tenth-grade level, which she concluded with the statement that "[f]or some reason (unknown to me) [Hall] is working well this semester and is doing good work on equal level with the other students in class." *Id.* at 1427.

(14) *S. Buentello*

Mr. Buentello was the chairman of the State Classification Committee of the Texas Department of Criminal Justice-Operations Division. In that capacity, he gave an affidavit stating that Hall's records at the prison indicated that Hall had not had disciplinary problems and had maintained a clear conduct record while confined in the prison. Mr. Buentello also served as record clerk of the Texas prison system. In that capacity, he authenticated copies of Hall's photograph, fingerprints, and commitment documents. Clerk's R., St. Habeas, Vol. 6 at 1481-92.

e. *Dr. Price's Affidavit Filed by State in Reply*

The State responded to the affidavits Hall filed on September 20, 2002, by the filing of another affidavit of Dr. Price, with supporting documents. *Id.* at 1496-568. The affidavit was signed October 5, 2002, and

filed October 7, 2002.

Dr. Price again provided, and elaborated on, his qualifications to speak on the subject of mental disorders. He provided more detail concerning his examination and evaluation of Hall's mental capabilities. His affidavit listed the sources of information upon which he relied in giving the affidavit, which included a review of the affidavits Hall had filed in support of his habeas application.

In Dr. Price's affidavit he focused on Dr. Denkowski's affidavit, pointing out the inappropriateness of Dr. Denkowski rendering an opinion concerning Hall's mental status without having conducted any kind of examination of Hall. Dr. Price stated that "the issue of the diagnosis of mild mental retardation is controversial and determining whether or not someone receives that diagnosis can literally turn on a word or a number." *Id.* at 1501. He discussed the misleading nature of the tendency of the advocates in favor of persons claiming mental retardation to raise the dividing point IQ to 75, *id.* at 1501-02; and, he explained that "[t]here is no consensus in the scientific literature about the structure or the measurement of adaptive behaviors," *id.* at 1502. Dr. Price explained that none of the specific adaptive skills that are to be considered can be reliably and validly measured with any existing instrument. *Id.* at 1503.

Dr. Price attached to his affidavit his initial report of his psychological evaluation of Hall over a period of three days in early February 2000. *Id.* at 1540-64.

The information contained in that report supplemented information Dr. Price previously had provided concerning Hall's mental status. For example, Dr. Price reported that "[Hall's] thought processes were goal directed and logical," "[h]is thought content was generally focused on religion, jury selection, and the trial," and "[h]is effort was good, and he showed no signs of problems related to attention or concentration." *Id.* at 1540.

Included in Dr. Price's report was a detailed discussion, on a day-by-day basis, of his interviews with Hall in early February 2000. *Id.* at 1552-62. The question and answer format used by Dr. Price demonstrated the extent to which Hall had the ability to reason and to conduct an intelligent conversation. Hall's response to one of Dr. Price's questions indicated that he understood the "law of parties"-that he could be held accountable for Neville's conduct in firing the shots that killed Amy Robinson. *Id.* at 1554. However, he expressed disagreement with the rule. *Id.* at 1562. Hall had a clear understanding of what was happening at his trial and the sequence of trial events. *Id.* at 1559. However, Hall obviously did not have a realistic view of his chances of success before the jury, though he had rational thoughts relative to factors that could lead to a successful trial outcome. *Id.* at 1560-61. Hall had enough presence of mind, and the verbal skills, to articulate positions he thought his lawyer should take in his defense, including focusing on his mental background and showing that he was "just not too bright in school." *Id.* at 1562.

f. *Dr. Denkowski's Second Affidavit*

On November 27, 2002, Hall filed a second affidavit of Dr. Denkowski. The court does not consider that it added anything helpful to the decisions to be made by the court. It was more of a memorandum of argument that would be presented by Hall's attorneys than an objective statement of facts and opinions by an expert witness. Clerk's R., St. Habeas, Vol. 6 at 1600-16.

3. *The State Habeas Court's Adjudication and Determinations of Factual Issues*

By order signed December 3, 2002, the state trial court adopted as its own the proposed findings of fact and conclusions of law the State filed in the habeas action on November 6, 2002. Clerk's R., St. Habeas, Vol. 6 at 1678. The state trial judge who made the habeas findings of fact had presided over Hall's trial as well, with the consequence that she could, and presumably did, consider her firsthand evaluations of the credibility of the trial witnesses.

On February 26, 2003, the Court of Criminal Appeals of Texas denied Hall's application for writ of habeas corpus by an order saying that the court adopted the trial judge's findings and conclusions and that the denial was based on those findings and conclusions and the court's own review of the record. *Ex parte Hall,* No. 53,668-1, slip op. at 1-2 (Feb. 26, 2003).

The standard for determining whether Hall was mentally retarded that the state court used in its habeas adjudication and fact findings was basically

the same as the standard to which the parties stipulated in the instant action. Clerk's R., St. Habeas, Vol. 6 at 1574-75, ¶¶ III, IV, & V.

After making determinations of evidentiary facts, each of which is supported by the state trial and habeas evidentiary records,[8] the state court made the following determinations of ultimate facts (which it characterized as conclusions):

> I. Applicant cannot be classified as mentally retarded because he fails to meet all three criteria of the definition set forth in Tex. Health & Safety Code Ann. § 591.003(13). *See Stevenson,* 73 S.W.3d at 914-17; *Ex parte Tennard,* 960 S.W.2d at 61.

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[8] The Fifth Circuit thought significant what it perceived to be errors on the part of the state court, Dr. Price, and Dr. Denkowski in stating that the IQ test Dr. Church administered to Hall resulted in a score of 72. *Hall v. Quarterman*, 534 F.3d 365, 370 & n.20, 371 n.27 (5th Cir. 2008). Not only is there nothing in the state court record to indicate that Dr. Price, Dr. Denkowski, or the state court would have reached any different results if they had treated Dr. Church's test score as 67 rather than 72, the record now affirmatively establishes that when properly scored the test administered by Dr. Church shows an IQ score of 72 for Hall. Tr. of Dec. 10, 2008, Hr'g at 59, 126.

Also, the Fifth Circuit expressed concern with the state court's credibility determination related to Dr. Church based on her lack of a Texas license or certification. *Hall*, 534 F.3d at 370-71. The state court did question whether the affidavit of Dr. Church, as well as the affidavit of Dr. Denkowski, should be considered, but said that a consideration of the affidavits would not cause the court's findings or conclusions to change. Clerk's R., St. Habeas, Vol. 6 at 1574. The court has no reason to think that the state court was not being truthful when it made that statement.

> Therefore, Applicant does not fall within the classification of mentally retarded capital offenders who are exempt from the death penalty under *Atkins*, 122 S. Ct. at 2244-52.
>
> II. Alternatively, even if Applicant falls within the upper range of mild mental retardation, he is not so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus regarding exemption from the death penalty. *See Atkins*, 122 S. Ct. at 2550 (recognizing that not all people claiming mental retardation will be "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus").
>
> *Id.* at 1592.

The state court's determinations of evidentiary fact issues served to explain and support the main and alternative determinations of ultimate facts set forth above. *Id.* at 1571-92. Based on such determinations, the state court adjudicated that Hall's mental retardation claim was without merit.

D. *The Adjudication and Determinations of Factual Issues Made by the State Court on Direct Appeal After Remand by the Supreme Court*

Following the remand of Hall's criminal case to the state court by the Supreme Court based on *Atkins*, on May 5, 2004, the Court of Criminal Appeals of Texas adjudicated Hall's mental retardation claim in a continuation of Hall's direct appeal. *Hall*, 160 S.W.3d at 24. The state court considered the

evidence received at Hall's trial, with emphasis on the punishment phase evidence, and the evidence received in Hall's state habeas action in making its adjudication of, and determinations of factual issues related to, Hall's mental retardation claim. *Id.* at 38, 39-40. By the time the state court adjudication and determinations were made, the state court had decided *Ex parte Briseno,* 135 S.W.3d 1 (Tex. Crim. App. 2004), in which the court adopted guidelines to be used for determining whether a defendant is mentally retarded. *Hall,* 160 S.W.3d at 36. Those guidelines include a definition that is the same as the one the parties stipulated is applicable to the instant action. *Supra* at 9.

The state court likened Hall's mental retardation claim to an affirmative defense upon which the burden of proof is always upon the defendant, both at the trial stage and habeas stage. *Id.* at 38-39. To sustain his claim of mental retardation, Hall was required to prove mental retardation by a preponderance of the evidence. *Id.*

As the state court noted, it already had reached a conclusion adverse to Hall's claim in Hall's state habeas proceeding in which the mental retardation claim was directly presented in the context of *Atkins. Id.* at 39. However, the state court re-reviewed the evidence. *Id.* After having done so, the court's conclusion did not change. *Id.* Finally, the state court deferred to the adjudication and factual determinations made by the state trial court in Hall's state habeas action. Based thereon, the state court affirmed the state trial court's judgment imposing

the sentence of death. *Id.* at 40.

Thus, the state court's adjudication and determinations of factual issues from which Hall is seeking relief here are those discussed in the immediately preceding subsection of this memorandum opinion.

IV.
Hearing Conducted December 10, 2008

A. *General Remarks*

Because of a concern that a proper hearing, at which witnesses testified from the stand and were subject to cross-examination before the judge, was not held on the issue of whether Hall was mentally retarded, the Fifth Circuit ordered that such a hearing be held in this federal habeas action. *Hall*, 534 F.3d at 371-72. When the court fixed the date for the hearing and defined prehearing procedures to be followed, the court ordered that "[w]itness testimony at the hearing will be limited to testimony taken in open court at the hearing," Oct. 6, 2008, Am. Scheduling Order at 2, ¶ 2, and directed that "no witness testimony will be received at the hearing by affidavit, declaration, or deposition," *id.* at 1.

As the prehearing procedures were being pursued, the court realized, and became concerned, that neither side was taking seriously the court's expectation that all witness testimony would be developed from the witness stand. The court raised this issue with counsel during a telephone conference conducted December 2, 2008. Tr. of Dec. 2, 2008,

Conference at 31. Counsel responded that they were satisfied to present most of their witness evidence by other than live testimony. *Id.* at 33. At the commencement of the December 10, 2008, hearing, both sides confirmed that they did not expect to cross-examine any witness whose testimony is received through affidavit, letter, or other hearsay-type document so long as they had an opportunity to cross-examine the experts, Dr. Cunningham and Dr. Price. Tr. of Dec. 10, 2008, Hr'g at 15.

To expedite the hearing, the parties agreed at the outset that the testimony given by the hearing witnesses at Hall's trial would be considered as part of the evidence at the hearing. *Id.* at 19-20.

B. *Witnesses Who Testified at the December 10, 2008, Hearing*[9]

1. *Witnesses Called by Hall*

a. *Karen Hall (Gray)*[10]

After having asked a few preliminary questions of Ms. Hall, counsel for Hall said that he did not have further questions, because her entire trial testimony was going to be considered by the court. On cross-examination, respondent's counsel developed that in October 1991 Hall was living with his mother and

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[9] The court has considered all the evidence received at the hearing even though much is omitted from the short summaries in this opinion.

[10] By the time she testified at the hearing, Hall's mother had changed her last name from Hall to Gray.

Warren Wells, and that Mr. Wells was abusive to both of them. Hall was withdrawn, and she guessed that he was depressed.

b. *Cheryl Conner*

Ms. Conner's testimony added little significance to the testimony she gave at Hall's criminal trial. *Supra* at 33-39. But, at the hearing, Hall's counsel apparently expected her to be an expert witness in support of Hall's mental retardation claim, an expectation that was somewhat frustrated by Ms. Conner's evasive response to counsel's first question to Ms. Conner:

> Q. Yes, Ms. Conner, I wanted to ask you whether or not you considered Michael Hall mentally retarded.
>
> A. (Pause.) Originally his classification was learning disabled, but when I looked at his records, because I felt like there was more going on, I found that, yes, he did have a classification of mental retarded in the past.
>
> Q. How did he-
>
> THE COURT: I don't think you answered his question. Did you form your own judgment whether he was mentally retarded, or were you simply relying on what other people had classified him in the past?
>
> THE WITNESS: I knew that there was more involvement with Michael than what the records showed, so I did some investigation and found

> that past test results had shown a substandard score.

Tr. of Dec. 10, 2008, Hr'g at 30-31.

She said that she was qualified to make an assessment of mental retardation, and was qualified to do so when she was working with Hall at school. According to the State of Texas, the IQ feature of a mental retardation diagnosis requires an IQ score of 75 and below. She did not give Hall an IQ test.

Her impression was that Hall was regressing while he was in her classroom, and she did not know whether the regression was the result of depression, a brain lesion, or drugs. Depression can be caused by a bad home life. Falling asleep in class and failing to engage can result from depression.

c. *Stephen Dollar*

After asking Mr. Dollar preliminary questions, Hall's attorney informed the court that, if the court is going to consider Mr. Dollar's habeas affidavit, Hall had no further questions. The cross-examination by respondent's counsel did not add anything of significance.

d. *Paul Conner*

After asking preliminary questions of Mr. Conner, Hall's attorney asked Mr. Conner if he stood by his state habeas affidavit. Mr. Conner responded that he did, and that everything in it is true. There was no cross-examination.

c. *Dr. Cunningham*

Dr. Cunningham's testimony repeated much of the testimony he gave at Hall's criminal trial. He interviewed and tested Hall for over ten hours in 2000. His diagnosis was that Hall had mild mental retardation. Mild mental retardation is an IQ score of between 55 and 70, up to 75 when the standard error of measurement is included; moderate mental retardation is an IQ score of 40 to 54; severe mental retardation is an IQ score of from 25 to 39; and profound mental retardation is an IQ score below 25.

In 1991 Hall scored 71 as his IQ on the WISC-R. The form on which the 1991 test score is recorded has a notation that: "[S]cores from last WISC-R were lower (mentally deficient range[ )]. However Michael falls in the borderline average range in this testing." Hr'g Ex. 4 at 592. The IQ test Dr. Cunningham administered to Hall in 2000 resulted in a score of 67, with a true range of 64 to 71, bearing in mind "an inherent degree of inaccuracy that's associated with all IQ testing." Tr. of Dec. 10, 2008, Hr'g at 58. He said that there is a ninety-percent likelihood that the range of scores between 64 and 71 contain Hall's true IQ.

He said that Dr. Church reported that her testing of Hall resulted in a score she described variously as 69 and 67. Both of her reported results were erroneous. The test form that she filled out at the time she gave the test "reflects a full scale IQ score of 72." *Id.* at 59.

The next, and most recent, intelligence test taken by

Hall was a WAIS-III taken in 2008, the same kind of test Dr. Cunningham gave Hall in 2000. The 2008 test resulted in a score of 85, which, when the expected margin of error is considered, means that there is a ninety-percent likelihood that the range of 82 to 89 contains Hall's true IQ.

In explaining the basis of his assessment of Hall, Dr. Cunningham said:

> I assessed Michael Hall in 2000, and my entire assessment is based on his status at that time. I have not attempted to update my findings with more contemporaneous information beyond the test that was given to him in 2002 and some affidavits that were provided in 2002. But otherwise, I have not attempted to bring this up to date as of today.

Id. at 61.

Dr. Cunningham discussed techniques he used in evaluating Hail's adaptive behavior. He administered a WAIS-III test; he looked at the academic functional literacy test given to Hall in school as well as one given to Hall in 2002 by Dr. Church; and, he assessed Hall's adaptive behavior by the interviews he did with third persons in the year 2000. The interviews he did, his WAIS-III testing, and his IQ testing all were done by him in 2000. All of his opinions were based on 2000 information, except when he sat on the witness stand he had also reviewed the affidavits of Mr. Coble, Mr. Harris, and Mr. Conner; the intellectual assessment and achievement testing done by Ms. Church in 2002;

and his review of summaries of what other witnesses were going to testify to in this case.

The test he used for the measurement of adaptive behavior did not look at what causes adaptive deficits. The IQ score must be relied on to form a judgment as to the cause of the deficits in adaptive behavior. He can reach different scores on adaptive behavior, depending on whose informant's information he is relying on. His informants were consistent in enough areas of adaptive behavior that he did not need to create an average for his diagnosis. Hall's adaptive behavior deficits put him in the mild mental retardation range.

When asked what distinguishes the conduct of somebody who is mildly mentally retarded, say with an IQ score of 70, from a person who has a measured IQ score of 76, he explained:

> THE WITNESS: There may be little discernible difference between somebody whose IQ score is only three or four or five points apart from each other. In other words, to sit down and talk to them, to interact with them, I might not identify a significant difference between them.
>
> THE COURT: How would you discern that difference?
>
> THE WITNESS: You would discern it by actually assessing them. In other words, you typically can't tell that somebody is mildly mentally retarded by simply having a conversation with them. They may be able to

express themselves. They have reading ability through about sixth grade. They may be able to do many things.

THE COURT: If they were one or two scores above mild mentally retarded, I guess they would have the same characteristics.

THE WITNESS: They would have many of the same characteristics, and so it's sort of an artificial dividing line to say at this point mental retardation begins.

Id. at 67-68.

He discussed what he calls the Flynn Effect, giving the following explanation:

This means that the population as a whole is getting better at the task that these IQ scores test. An IQ score is never like an x-ray. It's never that we took out your brain and weighed it. It's always where do you score in relation to the group. If the rest of the population is moving, then this test becomes more and more inaccurate in terms of reflecting your actual IQ every year that goes by from the date of standardization....

....

The Flynn Effect is the inflation of IQ scores that needs to be corrected if we're going to properly understand where is Michael actually scoring related to everybody else. The older the test norms are, the more inflation is present.

Id. at 80, 83.

Dr. Cunningham said that when the Flynn Effect is considered, the score on the WISC-R that Hall took in 1991 would be 66 or below. Standardization bias means that "the standardization of WAIS-III was over-represented in individuals who had very low IQs that resulted in the standardization distribution, not as accurately reflecting the actual population as would be appropriate," causing the WAIS-III to overestimate IQ scores by 2.34 points. *Id.* at 85. He discussed the effect that changes in standardization had on the results of Dr. Church's IQ testing on Hall.

He said that, other than the evaluation of Hall in November 2008, Hall meets the standard for an IQ score below 75, which means that Hall's IQ scores are "in the zone of eligibility for mental retardation"; and, when the standard error of measurement with the Flynn Effect is considered, "they are all well into the 60s." *Id*. at 89.

The direct examination of Dr. Cunningham concluded with the answer that "[a]t the time of my evaluation in 2002 and incorporating data available in 2000 and incorporating data through 2002, it is my opinion that [Hall] was at that time a person with mental retardation." *Id.* at 94.

On cross-examination, Dr. Cunningham testified that he has never been employed by the State in a capital case, but has been employed approximately 135 times by inmates in capital cases.

Dr. Cunningham could not answer "yes" or "no" to

the cross-examiner's question asking whether Hall's IQ score of 85 in the November 2008 testing is consistent or inconsistent with his opinion that Hall was mentally retarded at the time he committed his crime. He discussed confidence levels in IQ score results, saying that "the observed confidence interval range for an IQ score of 85, as Dr. Price administered ... would be from 82 to 89." *Id.* at 108. He also discussed possible inaccuracies in IQ testing results, posing the hypothetical, "say somebody's true IQ score is actually a 65, and sometimes when you test them they get a 63 and sometimes a 67 and sometimes a 69." *Id.* at 108. He then explained that when that hypothetical person has a 69 score, then "[t]he observed range on that 69 would be between 65 and 73." *Id*. at 109.

Dr. Cunningham gave the following possibilities as to why Hall had an IQ score of 85 in November 2008:

> In 2008 we get this 85 that is broadly discrepant from these others. Now, one possibility is that Michael Hall has gotten much smarter in the last eight years since I tested him. That's one possibility. Another possibility is that there are some other factors that are at work that are causing us to get this higher result now than what we saw before. What could those be?
>
> Well, one possibility is that there is a standard error of measurement that's operating that has resulted in this score being a little bit more of an outlier. Another possibility is the Flynn Effect, which is that this score has been inflated in terms

> of the rest of the group. Another possibility is that there were problems in the administration or scoring of this test that caused it to depart from standardization and that resulted in inflated scores.
>
> There are several different hypotheses that we might look at about how come this score is fundamentally different than the scores that were obtained previously over a 13-year period of time.

Id. at 110-11. He added as a hypothesis as to why Hall's November 2008 IQ score of 85 was so much higher than earlier IQ scores that the earlier testing did not accurately measure Hall's intelligence at the time of the testing.

There is sound scientific research and recommendations for the correction of IQ scores for the Flynn Effect, but it is not broadly practiced in the educational or professional community "because science takes a while to disseminate its way out into standard and into everyday practice." *Id.* at 112.

He described things the person administering an IQ test can do to cause the test result to be unreliable. There were significant problems with Dr. Church's expert report concerning Hall. She made errors in administering the WAIS-R, there were discrepancies in her scoring, and the scores she reported in her report and her affidavit were inconsistent with the scores she reported on the protocol of the test that she gave.

If the IQ score of 85 derived from the test Dr. Price

performed in November 2008 were to be corrected for any perceived errors and reduced by the Flynn Effect, the range of the score, assuming a 95% confidence interval, would be at its lowest 72.

A person's score on an IQ test can be negatively affected by depression, sleep deprivation, anxiety, behavioral disorders, and attention deficit disorder. The relationship existing between the person performing the test and the subject can affect the score. He discussed why that is so. All of the adverse things happening in Hall's environment might or might not undermine the validity of his IQ test scores, though he considered Hall's IQ scores to be reliable.

2. *Witnesses Called by Respondent*

a. *Stephen Hillman*

Mr. Hillman was a commissary manager at the prison unit where Hall was confined. He identified as part of the records of the prison unit Commissary Order Slips used by Hall in 1998 to order items from the prison commissary. Hr'g Ex. 13. The order slips show that the person who completed them was able to specify the quantity desired, write out a description of the items desired, fill in the price of the individual items, and show the amount where more than one item was desired and a total of all of the amounts. Apparently the multiplication and addition on the order slips are correct. The handwriting is legible, and the spelling appears generally to be correct. Mr. Hillman noted that to

complete the order slips an inmate needs to use math and be able to read and write. The inmates fill out the order slips themselves. Hall did not have a cell mate who could fill out the slips for him. There would not have been anyone outside Hall's cell who could have filled them out for Hall.

b. *Melissa Byley*

Ms. Byley was a librarian at the prison unit where Hall has been confined. She identified book request forms completed by Hall requesting books from the prison library. Hr'g Ex. 9. To comply with the requirements for completing the forms, Hall had to list the authors and titles of the books he was requesting. She identified another exhibit as a record of the library that lists by author and title of book the books Hall ordered from the library. Hr'g Ex. 8. Each time Hall received a book from the library, he was obligated to keep it seven days. If he had not completed it within seven days, he was required to re-check it. Based on her experience, Hall's check-out list was greater than the average death row inmate. Hearing exhibit 10 is a notice that appears on the back of the book request forms that gives the inmates instructions about checking out books. Hearing exhibit 12 is a specimen page of a large book available to the inmates in which books are listed by author and title to assist the inmates in selecting books they wish to request.

c. *Robert Woodrow*

Reverend Woodrow was a minister for the Hillcrest

Church of Christ in Arlington, Texas. He became acquainted with Hall when Hall started attending the church in March or April, 1997. He believed that Hall's stepbrother invited him. Rev. Woodrow did not interact often with Hall before Amy Robinson's murder. After the murder, he visited with Hall at least eleven times in 1998 and at least seven times in 1999. Hall was able appropriately to respond to questions Rev. Woodrow asked him, and Hall would initiate conversations with Rev. Woodrow. He talked to Hall like he would talk to most any teenager.

He identified hearing exhibit 6 as an exchange of letters between him and Hall after Hall was convicted and sent to prison. Hall's letters show that Hall was capable of expressing himself. In Hall's letters, he requested Volumes I and II of Herbert W. Armstrong's autobiography and a King James Holy Bible of Prophecy in large print, black leather. Hall mentioned in one of his letters that he read a J.K. Rowling Harry Potter book, and half of another. Also, Hall discussed current events in the letters he wrote. At least twice in his letters, Hall mentioned that he was depressed.

His experience with Hall was that Hall had no trouble reading the correspondence he sent to Hall or understanding the conversations they had. One of the reasons he did not think Hall is mentally retarded is because of their conversations.

d. *Russell Bartholome*

Mr. Bartholome was a high school teacher who in the

spring and summer of 1997 was asked to help with a youth group at Hillcrest Church of Christ where he had occasion to interact with Hall. Hall's dress and grooming seemed to be appropriate for his age. Hall had a girlfriend in the church group briefly during that period of time, and he noticed that they had a hand-holding relationship. The girl was very smart, very capable, artistic, and well-read. Hall used a workbook provided to members of his group the same as other members. The reading level of the workbook was middle school to lower high school. The answers Hall filled in answered the questions that the workbook posed. They often had group discussions that involved posing questions to members of the group. Hall answered appropriately.

e. *Linda Haynes*

Ms. Haynes was a psychologist at the Irving School District when she evaluated Hall. She identified as an exhibit the report her committee proposed in April 1993 of an evaluation they made of Hall in March 1993. Hr'g Ex. 29 at 288-93. The goal of the evaluation was to determine whether Hall was seriously emotionally disturbed-whether he had emotional issues that were interfering with his ability to learn.

From looking at Hall's IQ scores, she did not have the impression that Hall was mentally retarded. The testing of Hall done for the Irving Independent School District showed on a WISC-R Hall's full-scale IQ score to be 71. *Id.* at 290. She did not recall that any of the committee members who participated in

the evaluation of Hall in 1993 considered him to be mentally retarded.

f. *Ken Trainer*

Mr. Trainer, who was Hall's workshop teacher when Hall was in the tenth grade, added little of significance to the testimony he gave when called as a witness by Hall at Hall's trial. As the school year progressed, Hall became more motivated, sometimes voluntarily coming in early in the morning or working late in the afternoon on his projects. Hall preferred not to do things when other students were in the class. They would pick on him, and he did not associate with the others easily.

The project Hall did on his own was a game console-a television monitor with a joystick. Hall came up with the idea for the project and showed Mr. Trainer a picture of what Hall wanted to do, and then the two of them drew the plans for the console. Over a period of time, he gained complete confidence in Hall's ability to use the woodworking tools. It would sometimes take Hall longer to catch on, but then he would catch on and be able to do the things the other students were doing. Hall could do the projects on his own after having been given instructions.

g. *Dr. Price*

Dr. Price had been involved in 232 capital cases since 1986, and he had testified 24 times in capital cases in the last eleven years, 54% of the time for the prosecution and 46% for the defense.

Dr. Price's opinion was that Hall's measured IQ at this time is 85 and that it was approximately 67 to 72 at the time of Amy Robinson's murder. He corrected what he said to say that his opinion was that Hall's measured IQ at the time of the crime was 67 plus or minus five points.

In his opinion, the evidence indicates that Hall had adaptive behavior deficits related to both his low intelligence and his adjustment problems. He means by "adjustment problems" the problems Hall was having in his life-problems with his family and coping and adjusting problems in school. His behavior deficits were not all the result of low intelligence, but were tied to his family, home, and failing in school, as well as low intelligence. He was unaware of any way to distinguish or separate adaptive function deficits caused by low intelligence from those caused by environmental factors. He did not think that there is any way they can be separated from a scientific standpoint. Because of Hall's prison environment, there is no way a measurement could be made at this time of his adaptive behavior. In his opinion, the evidence indicated that Hall had problems with adaptive behavior and general adjustment to his environment, both home, school, and work, in the years 1998 through 2000.

He could not say that Dr. Cunningham's WAIS-III IQ score of 67 for Hall in the year 2000 was an accurate reflection of Hall's actual IQ. "There were a lot of things going on in Mr. Hall's life, even at the time of the trial, that could have had an effect on his

measured IQ, and that may have lowered it." Tr. of Dec. 10, 2008, Hr'g at 204. If a defendant has knowledge that a low intelligence level will help him in the defense of a case, he can, in effect, rig the outcome of an IQ test in the sense of causing the test to make the defendant to appear less intelligent.

Dr. Price explained a phenomenon he has observed in the testing of persons facing the death penalty.

> THE WITNESS: I've been testing inmates, death row inmates, and defendants for 26 years; and I've noticed something that's really interesting. They tend to do that faking, that doing more poorly than they can, much more at trial stage than after they've been in prison on death row for years. It's been a rare case indeed that I've had somebody try to rig the IQ score, as you said, when I've gone to test them on death row. It's been an interesting thing to observe how consistent that's been, when at trial stage it happens sometimes.
>
> THE COURT: Do you have any scientific explanation for that?
>
> THE WITNESS: Well, I don't know if it's scientific. It's certainly a theory that I have that at trial stage, of course, everything is up in the air. They don't know what's going to happen. They're scared. They're anxious a lot of times or angry. And they just do that. Sometimes they try to fake. They get to death row for a few years, and for a lot of them all they really have is their self-

> respect. And they would rather, to put it kind of crudely, they would rather be executed than to look like they're dumb or in some way disturbed. They try-especially on cognitive tests that I've given them. I can only think of one death row inmate that tried to score poorly on purpose on tests that I've given them. And, you know, I've tested hundreds.

Id. at 205-06.

When Dr. Price tested Hall in November 2008 he used three tests to have a quantitative indication of Hall's effort and his level of motivation, which are standard tests that would be conducted when doing a forensic evaluation of IQ. All three tests showed that Hall was putting forth good effort and was motivated to do his best. He conducted two IQ tests, one was the WAIS-III and the other was a RIAS. The RIAS is an accepted test for measuring IQ. Hall's score on that was 85. The gold standard in IQ testing is the WAIS. The RIAS correlates .75 with the WAIS. Hall's test score on the WAIS was 85. The giving of two IQ tests, as he did, was desirable because it enables the person conducting the test to see if there is consistency in the testing. Research indicates that the RIAS score is a little higher than the WAIS, but not significantly so.

As a result of his evaluation of Hall in 2008, he concluded that Hall's intellectual functioning was low average; and, considering the standard of error, it would be from the borderline to the low average level of intellectual functioning. By "borderline," he

meant an area between 70 and 85, which would put Hall at the high end of the borderline range of intelligence.

When asked to explain why Hall's IQ score was higher in 2008 than it had been in 2000, he explained:

> I think that there are two opposing or two separate possible explanations for that. The first one would be, as it was related to Dr. Cunningham's testimony, the first explanation would be that the IQ score that I got on Mr. Hall in 2008 was inflated due to either bias on my part or that Mr. Hall had become more intelligent in the last eight years. That's one set of explanations.
>
> On the other end, the other side of that could be that the IQs that he got in school in '91 and at trial stage were underestimates due to all the external factors going on in his life: the emotional turmoil, the chaotic home, the failure in school, and the resulting problems he had with self-esteem and with motivation and with effort.
>
> So it's one or the other. It's either that it's artificially inflated on the one I gave, or it's an underestimate on the IQ scores obtained when he was in school and at trial stage.

Id. at 211.

He said that he does not think his testing of Hall was biased. The test was administered properly, and his opinion is that the test score was not an artificial

inflation.

A person's intelligence can improve over time. People are known to progress from being mildly mentally retarded at a certain age and later not meet the criteria of being mildly mentally retarded. That generally results because of an increase in the adaptive behavior skills of the person in question. It is more likely that a person's adaptive behaviors can improve over time rather than a person's IQ score. With respect to test results obtained from testing of Hall's IQ in the 90's and early 2000, Dr. Price said, "I think it's likely that those are not accurate, that they are somewhat of an underestimate because of the external factors, and I don't know about his effort and his motivation on those tests." *Id.* at 212. There was not any effort or motivation testing done at the time of the earlier tests. He discussed factors that can cause an IQ test score to be unreliably low.

Dr. Price responded to, and explained away, Dr. Cunningham's criticism of the things Dr. Price did in the testing of Hall in 2008, He explained why he did not have an unqualified opinion when he testified at trial that Hall was not mentally retarded. His opinion now is that Hall was not mentally retarded at the time of Hall's trial. He did not believe that the earlier IQ testing of Hall accurately reflected Hall's intelligence.

Dr. Price discussed the Flynn Effect. He disagreed with Dr. Cunningham's testimony concerning the level of reduction in an IQ score that should be made to take into account the Flynn Effect. It is not

standard practice in the scientific community to adjust an IQ score for the Flynn Effect; he gave an explanation why that is so. He had never applied the Flynn Effect on any of his cases, either those where he testified for the defendant or those where he testified for the state.

He considered the WAIS-III manual to be a technical report from the publisher of the test that provides technical information about the test and is a reliable source for how to administer the test. He considered the DSM-III-TR to be a reliable source on the diagnosis of mental retardation.

On cross examination, there was a discussion of standardizing tests and steps that the manual suggests should be taken in administering the tests. Dr. Price had no reason to believe that the WISC test that Nancy Stephens administered in 1991 was not administered and scored correctly. He believed the test that Dr. Cunningham gave in 2000 was properly administered and scored. According to the DSM-IV-TR, a mildly mentally retarded person can achieve academic achievement up to about the sixth grade level.

The 71 score Hall received on the WISC-R test in 1991 put Hall in the borderline range but not in the mentally retarded range. At that time, Hall's parents had recently divorced, his mother was living with an abusive man, and Hall was subject to that abuse and was witnessing the abuse of his mother. At the time Dr. Cunningham administered an IQ test in 2000, Hall was in jail, he recently had committed a capital

murder and was on trial for that murder, and he was on suicide watch.

Through questioning on redirect examination, Dr. Price listed the different IQ test scores of Hall that he was aware of, only one of which was below 70. Dr. Price noted that the correct score on the IQ test Dr. Church administered in 2002 was 72.

V.
Analysis

The court has given consideration to the post-hearing briefs of the parties. In Hall's brief there is a sharp departure from the understanding the parties placed on the record at the commencement of the December 10, 2008, hearing that the purpose of the hearing was to provide the court basis to determine whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence. *Supra* at 9. Hall asserts now that the hearing should be followed by a finding of this court from a preponderance of the evidence whether Hall is mentally retarded. Pet'r Br. at 1, 36. He argues that this court should not give deference to the state court's adjudication on the merits of Hall's mental retardation claim or the state court's determinations of factual issues related to that claim. *Id.* at 12-14, 36.

Before devoting further attention to Hall's assertion that the state court's adjudication and determinations of factual issues are entitled to no

deference, the court assumes, arguendo, that Hall is correct in that regard and that this court must make a finding as to whether Hall has proved by a preponderance of the evidence that he is mentally retarded. After a thorough review of the record, the court finds that it is unable to find from a preponderance of the evidence[11] that Hall is, or ever has been, mentally retarded.

Put simply, the court has not been persuaded by the evidence that Hall's claim that he is mentally retarded is more likely so than not so, nor has the court been persuaded by the greater weight and degree of credible evidence before the court that Hall is mentally retarded, or that he ever has been.

Of the expert evidence offered by the parties, the court finds that the evidence of Dr. Price is more persuasive than that provided by Hall's expert witnesses. The latter impressed the court as serving more as advocates on behalf of Hall that he should not be executed than as objective witnesses. In contrast, Dr. Price impressed the court as being totally objective in his evaluation of Hall's level of intelligence and behavioral attributes, with the goal of informing the court rather than to serve as an advocate for either side.

The court finds that the 85 IQ score for Hall on the

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[11] "Preponderance of the evidence" generally is defined as "the greater weight and degree of credible evidence" before the fact finder and "the amount of evidence that persuades [the fact finder] that a claim is more likely so than not so." Fifth Circuit Pattern Jury Instructions, Civil § 3.1 (West 2006).

testing done by Dr. Price in November 2008 is the best measure the court has been provided of Hall's general intellectual functioning. Therefore, the court cannot find that Hall has satisfied the first element of the definition of mental retardation that he have a "significantly subaverage general intellectual functioning [defined as an IQ of about 70 or below]."[12] *Supra* at 9.

The court has considered all of the test scores about which there is evidence in the record, and the court has concluded that none of them provides persuasive evidence that Hall has had at any relevant time significantly subaverage general intellectual functioning as contemplated by the Texas' *Atkins* test for mental retardation. The school personnel, who would be most intimately acquainted with Hall's intellectual functioning, expressed in the school records that Hall was learning disabled but not mentally retarded. The evidence indicates that those views were based on Hall's intelligence testing as well as his behavior. The court is not giving significant weight to the comment in one of the school records that sometime before October 1991 Hall scored in the mentally deficient range. That comment, without more, is not helpful to the evaluation of Hall's intelligence level at times pertinent to this action.

Helping to undermine the opinions expressed by

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[12] The definition to which the parties stipulated was referred to by the Fifth Circuit as "Texas' Atkins test for mental retardation." *Hall v. Quarterman*, 534 F.3d 365, 369 (5th Cir. 2008).

Hall's experts that he is mentally retarded is the evidence putting into question the reliability of the results of intelligence testing he received. Because of the margin of error involved in a measured IQ score and the other uncertainties surrounding the reliability of intelligence testing, the court is unwilling to accept any of the reported IQ scores of Hall as satisfying the "significantly subaverage general intellectual functioning" feature of the definition of mental retardation. The court has taken into consideration the evidence that Hall's home and social environments and his emotional state could have artificially lowered some of Hall's IQ scores and that an IQ test administered to Hall while he was awaiting trial facing the death penalty could have resulted, consciously or otherwise, in an unreliably low score.

The record makes clear that Hall's environment could undermine the validity of his IQ test scores, and the court is not persuaded from the evidence that his environment did not so undermine Hall's pre-2008 test scores as to cause them to be unreliable as evidentiary support for his mental retardation claim. The court is not impressed by Dr. Cunningham's testimony concerning utilization of the Flynn Effect. Also, the court has taken into account the evidence that IQ tests can be made unreliable by the conduct of the person administering the test.

Similarly, the court finds that much of the evidence on which Hall relies in support of the adaptive functioning feature of Texas' *Atkins* test for mental

retardation is of questionable reliability. He relies on information provided by persons who had a natural tendency to help Hall prove that he is mentally retarded-his mother, his brother, the two attorneys who represented him unsuccessfully at his criminal trial, two investigators hired by his attorneys, and a fellow death row inmate. School personnel provided conflicting information about Hall's behavior. Information from prison personnel, Hall's minister, and other witnesses presented by respondent contradicted much of the behavior information on which Hall relies. The court also has considered on the adaptive functioning issue the undesirable home and social environments to which Hall was subjected and his emotional problems, all of which had the potential to adversely affect his adaptive functioning in ways that are unrelated to general intellectual functioning.

The court is not persuaded by the opinions of Hall's experts on the subject of adaptive functioning. Again, the court's perception is that the experts were advocating a case of mental retardation for the benefit of Hall rather than to make objective presentations to the court. The court finds Dr. Price's testimony on the subject of adaptive functioning to be the most persuasive. The other experts selectively used information that would support their adaptive functioning theory, and they seem to have disregarded information available to them that put into question their stated findings.

There is a possibility that Hall has adaptive functioning deficits that are related to low

intelligence, but the court is unable to find from the evidence the degree to which that is so as distinguished from the degree to which whatever deficits Hall might have are related to what Dr. Price referred to as adjustment problems.

The court is satisfied that Hall's intelligence is low, and that in certain respects his behavior does not conform to the behavior of most persons. However, the court has not been persuaded by the evidence that Hall's intellectual functioning goes below the dividing line between mental retardation, on the one hand, and less significant forms of learning disability, on the other, or that limitations he has in adaptive functioning are significantly related to whatever limitations he has in general intellectual functioning.

The court returns now to the contention made by Hall in his post-hearing brief that the state court's adjudication and determinations of factual issues are entitled to no deference.

If, as Hall suggests, the opinion of the Fifth Circuit that remanded this action to this court for a hearing on the subject of mental retardation included a holding that, because the state court did not give Hall the kind of hearing the Fifth Circuit thought he should have been given, this court should not give deference to the state court's adjudication and determinations of factual issues, the opinion of the Fifth Circuit would directly conflict with the 2001 Fifth Circuit decision in *Valdez*, 274 F.3d at 950-51, 959, that is discussed at *supra* 8. If that were so, the

Fifth Circuit panel deciding *Hall* would have violated the rule in the Fifth Circuit that one panel may not overrule the decision, right or wrong, of a prior panel, absent en banc reconsideration or a superseding contrary decision of the Supreme Court. *See United States v. Ruff*, 984 F.2d 635, 640 (5th Cir. 1993). Under that rule, "where holdings in two ... opinions are in conflict, the earlier opinion controls and constitutes the binding precedent in the circuit." *Boyd v. Puckett*, 905 F.2d, 895, 897 (5th Cir. 1990). The court prefers to assume that the panel did not intend to violate that rule. Consistent with the belief that Judge Higginbotham expressed in his dissenting opinion (*supra* at 8-9 n. 3), the court does not consider that the majority of the panel intended to say that upon remand this court should not give deference to the state court's mental retardation adjudication and the state court's determinations of factual issues related to Hall's mental retardation claim.

The court is satisfied that the parties were correct when they agreed at the commencement of the December 10, 2008, hearing that the issue properly before this court for decision is whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence.

At the outset of the court's deference determinations, the court considers arguments made by Hall in his post-hearing brief based on the provisions of 28 U.S.C. § 2254(d). Hall is now arguing that the state court's adjudication on the merits of his claim of

mental retardation resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, Pet'r Br. at 12-13, 29-30, or, in the alternative, that the state court's adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, *id.* at 13-14.

Hall's first § 2254(d) contention is premised on Hall's belief that the state court's adjudication against Hall was that "even if Hall is mentally retarded ... he is nonetheless subject to execution if he is only mildly mentally retarded," and, therefore, the adjudication was an unreasonable application of *Atkins*. *Id.* at 29. This contention undoubtedly refers to the alternative ultimate finding of fact made by the state court. *Supra* at 77. The fallacy in Hall's contention is that it takes issue with the wrong finding.[13] The determination applicable here is the ultimate finding of the state court that Hall "cannot be classified as mentally retarded because he fails to meet all three criteria of the definition set forth in Tex. Health & Safety Code Ann. § 591.003(13)." *Id.* As reflected by

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[13] Considering that in *Atkins* the Supreme Court seemed to leave open the possibility that persons with a minor degree of mental retardation can be subject to the death penalty, *Atkins*, 536 U.S. at 317, the court cannot say that the alternative determination by the state court of the ultimate mental retardation factual issue involves an unreasonable application of clearly established federal law as determined by Atkins. However, the court need not devote further attention to that point because the main determination of the state court clearly does not involve an unreasonable application of Atkins.

language used in *Ex parte Briseno,* 135 S.W.3d 1, 7-8 (Tex. Crim. App. 2004), the state court based its main determination of the ultimate mental retardation factual issue on what the Fifth Circuit referred to as "Texas' *Atkins* test for mental retardation." *Hall,* 534 F.3d at 369.

As to Hall's second § 2254(d) contention, the court persists in its conclusion that the adjudication of the state court on Hall's mental retardation claim was not based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings. *Hall,* 443 F. Supp. 2d at 821. The court concludes that the ultimate determination by the state court that Hall did not establish that he was mentally retarded was a reasonable determination in light of the evidence presented in the state court proceedings. And, the court concludes that all of the state court's determinations of evidentiary factual issues, Clerk's R., St. Habeas, Vol. 6 at 1570-92, in support of its determination of the ultimate issue of mental retardation were reasonable determinations of the facts in light of the evidence presented in the state court proceedings.

In Hall's post-hearing brief, he makes the point that in its opinion remanding the action to this court the Fifth Circuit criticized the state court for making determinations of fact based on erroneous information. As noted earlier in this memorandum opinion, *supra* at 77 n. 8, the information the Fifth Circuit thought was erroneous turned out not to be erroneous in one instance and not to be outcome determinative in the other.

On the issue that the parties agreed at the commencement of the December 10, 2008, hearing was the deciding issue, the court finds that Hall has not rebutted the presumption of correctness of the determinations of factual issues made by the state court on Hall's mental retardation claim by clear and convincing evidence.[14] While the state court's determination of the ultimate fact issue was not expressly stated as a failure of Hall to carry his burden to prove mental retardation by a preponderance of the evidence, *supra* at 77, the only reasonable reading of the determination is that the state court found that Hall failed to carry his burden. By no stretch of the imagination does the evidence

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[14] The Fifth Circuit has defined the clear and convincing evidence standard as follows:

> Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.

Shafer v. Army & Air Force Exch. Serv., 376 F.3d 386, 396 (5th Cir. 2004) (quotation marks omitted). The definition in the Fifth Circuit Pattern Jury Instructions, Civil is worded as follows:

> Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required.

§ 2.14.

before the court constitute clear and convincing evidence that the state court's determination was incorrect. That would be so even if the state court's ultimate determination were to be viewed to be an affirmative finding that Hall is not mentally retarded. Thus, the state court's determinations of factual issues are presumed to be correct; and, 28 U.S.C. § 2254(e)(1), therefore, requires that this court defer to those determinations.

VI.
Other Issues Presented in Hall's Post-Hearing Brief

Hall presents in his post-hearing brief what he refers to as *Ring* and *Penry* claims. Pet'r Br. at 30-36. He maintains that the Fifth Circuit "deferred its COA decision" on those claims. *Id.* at 14. Whether or not that is an accurate statement of what occurred, the fact is that the Fifth Circuit has not granted a certificate of appealability as to either of those claims. Therefore, the court will not undertake a decision as to either of them.

VII.
Conclusion

As explained above:

1. If appropriate for this court to decide the issue, this court finds that Hall has not proved by a preponderance of the evidence that he is, or ever has been, mentally retarded.

2. The court is of the opinion that the court should give deference to the state court's adjudication on the

merits of Hall's mental retardation claim as well as to the determinations made by the state court of factual issues related to that adjudication. The state court adjudicated that Hall's mental retardation claim was not supported by the evidence received at Hall's criminal trial and in his state court habeas action. Hall has not shown that the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that it resulted in a decision that was based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings. The determinations made by the state court of factual issues related to Hall's mental retardation claim are presumed to be correct, and Hall has failed to rebut that presumption of correctness by clear and convincing evidence.

Therefore, Hall's application under 28 U.S.C. § 2254 must be denied.

VIII.
Order

For the reasons given above,

The court ORDERS that Hall's application under 28 U.S.C. § 2254 be, and is hereby, denied.

Appendix C

United States Court of Appeals,
Fifth Circuit.

Michael Wayne HALL, Petitioner-Appellant,
v.
Nathaniel QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.

No. 06-70041.

June 30, 2008.

Before KING, HIGGINBOTHAM and GARZA, Circuit Judges.

PER CURIAM:

Michael Wayne Hall was convicted of capital murder in state court. He sought state and federal habeas relief, requesting in each forum a live evidentiary hearing on his claim of mental retardation. Each court denied his request. We granted a Certificate of Appealability.

I

Michael Wayne Hall was tried in Texas state court for the murder of Amy Robinson and convicted of capital murder by the jury. Although he was convicted prior to the Supreme Court's decision in *Atkins v. Virginia*, which held that the execution of

mentally retarded defendants is unconstitutional,[1] there was evidence regarding his mental abilities presented at trial in mitigation. On direct appeal, the Texas Court of Criminal Appeals (the "CCA") affirmed the conviction, rejecting his *Penry* claim and his claim that the Constitution barred the execution of mentally retarded persons. Hall filed a state petition for writ of habeas corpus and a petition for certiorari with the United States Supreme Court. In his state habeas petition, Hall asserted his claim of a constitutional bar to execution of the mentally retarded and requested a "full and fair hearing," urging, "There has never been a fact finding rendered by either the trial court or a jury as to the issue of whether Applicant is, in fact, mentally retarded." While his state habeas claim was pending, the Supreme Court decided *Atkins*. Hall requested a live hearing on the mental retardation issue, urging, "Because the issue of whether or not Applicant is 'mentally retarded' has never been fully and fairly litigated and resolved by a fact-finder, this Court cannot rely solely on ... [its] recollection of the testimony from the trial which was conducted over two (2) years ago. This Court should, at a bare minimum, conduct a live hearing on this matter." Hall also objected to the state court's "conducting a hearing on Applicant's *Atkins* claim via affidavit rather than via live hearing." Despite *Atkins*, the trial court conducted a "hearing" by affidavit without awaiting the disposition of Hall's pending certiorari petition, and the CCA, relying on the paper results, denied Hall's state habeas claim.

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[1] 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

The Supreme Court granted Hall's petition for certiorari from his direct appeal to the state court, vacating and remanding to the CCA to reconsider its initial affirmance of Hall's conviction in light of *Atkins*. The CCA, relying on the state habeas and direct appeal records and a "re-review[ ][of] the evidence" from the records, held that Hall was not mentally retarded.[2] Hall appealed again to the Supreme Court, which denied certiorari, and he then filed a federal habeas petition, again arguing, "Mr. Hall has a right under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a full and fair hearing in a court of law on the issue of his mental retardation." The federal district court relied on the state record to conclude that Hall was not retarded, and denied Hall's *Atkins* claim. We granted a COA.

II

In applying the deferential standard under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), we are mindful of the unique facts of this case, in that *Atkins* was decided after Hall's conviction, and the state's paper hearing on the *Atkins* mental retardation issue was completed before Texas had defined mental retardation under the *Atkins* standard. We review the federal district court's refusal to grant an evidentiary hearing on the *Atkins* issue for an abuse of discretion.[3]

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[2] *Hall v. State*, 160 S.W.3d 24, 38-40 (Tex. Crim. App. 2004).

[3] *Schriro v. Landrigan*, 550 U.S. 465, 127 S. Ct. 1933, 1937, 167 L. Ed. 2d 836 (2007) ("In cases where an applicant for federal

Section 2254(e)(2) of United States Code Title 28 does not constrain the district court's discretion here because Hall diligently developed the factual basis of his claim in state court.[4] In the state habeas proceedings, Hall consistently raised his claim that he was mentally retarded and that execution of a mentally retarded individual is unconstitutional.[5] He also provided affidavits of experts, affidavits of former teachers and other individuals who were familiar with Hall's capabilities,[6] and evidence of

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habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court."); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998) (citing *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998)) ("Denials of an evidentiary hearing are reviewed for abuse of discretion.").

[4] *See* 28 U.S.C. § 2254(e)(2) (requiring an applicant to show, *inter alia*, that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense" only if "the applicant has failed to develop the factual basis of a claim in State court proceedings").

[5] In his first state habeas petition, Hall prayed that the court would grant relief "after a full and fair hearing" and argued:

> The right to argue mental retardation in mitigation on a case-by-case basis under article 37.071, section 2(e)(1), Texas Code of Criminal Procedure (the so-called Penry instruction) is insufficient to prevent the risk that retarded persons will be sentenced to death despite their lack of the requisite culpability ....

[6] As the CCA put it, Hall provided "testimony of three psychologists, his mother, his brother, his trial attorneys, two private investigators, four teachers, and a fellow death row inmate." *Hall*, 160 S.W.3d at 39-40.

mental limitations, such as medical records, grade reports and special education screening results from school, and the results of Hall's examination for competency to stand trial. These were more than adequate to establish a factual basis for his mental retardation claim.

Once a district court determines that a petitioner may be entitled to an evidentiary hearing, this is not the end of the inquiry, since "[i]n cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court."[7] In determining whether to grant a hearing, under Rule 8(a) of the habeas Court Rules " 'the judge must review the answer [and] any transcripts and records of state-court proceedings ... to determine whether an evidentiary hearing is warranted.' "[8] And the Supreme Court has held since AEDPA that the court must also "consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate."[9] And

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[7] *Schriro*, 127 S. Ct. at 1937.

[8] *Id.* at 1939 (quoting 28 U.S.C. § 2254, Rule 8(a) and finding that post AEDPA, the "basic rule has not changed").

[9] *Id.* at 1940 (internal citation omitted) (citing *Mayes v. Gibson*, 210 F.3d 1284, 1287-88 (10th Cir. 2000)). Section 2254 provides in relevant part:

finally, a district court abuses its discretion in not holding an evidentiary hearing only if the state court failed to provide a full and fair hearing.[10]

The facts before us are a core manifestation of a case where the state failed to provide a full and fair hearing and where such a hearing would bring out facts which, if proven true, support habeas relief. Hall alleges that he is mentally retarded under Texas' *Atkins* test for mental retardation announced in *Ex Parte Briseno*; under *Briseno* a defendant must

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(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. §§ 2254(d), (e)(1).

[10] *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000) (citing *Moawad v. Anderson*, 143 F.3d 942, 948 (5th Cir. 1998)) ("To find an abuse of discretion which would entitle ... [petitioner] to discovery and an evidentiary hearing to prove his contentions, we would necessarily have to find that the state did not provide him with a full and fair hearing ....").

prove that he has "(1) significantly subaverage general intellectual functioning ['defined as an IQ of about 70 or below']; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18."[11] Because neither *Atkins* nor the *Briseno* test had been established at his original trial, and *Briseno* was not decided until approximately two years after the state court's paper hearing on mental retardation,[12] upon which the CCA and the district court relied, Hall never had the opportunity to present a full range of evidence on this technical issue.[13]

The federal district court discussed the *Briseno* factors but did not conduct a hearing, relying instead on the state court's findings of mental retardation-findings that were made prior to the *Briseno* test. The district court explained, "In his petition, Hall thoroughly reviews the voluminous evidence as to his mental capacity. The state does the same in its

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[11] 135 S.W.3d 1, 7 (Tex. Crim. App. 2004) (internal citations and quotations omitted).

[12] The parties in the state habeas case filed their affidavits for the paper *Atkins* hearing with the trial court in September 2002. *Briseno* was decided on February 11, 2004.

[13] Hall emphasized in a motion to stay the paper proceeding in the state court,

> Despite *Atkins*' prohibition against the imposition of a death sentence against mentally retarded capital defendants, the Supreme Court's opinion leaves it to the individual States to develop the appropriate method to enforce this restriction. There is currently no statutory procedure set out in Texas to govern the determination of whether or not Applicant (or any other capital defendant) is mentally retarded as contemplated by *Atkins*.

response. There is no reason for the court to do so again here."[14] The court examined the paper evidence and held, "Having independently reviewed all of the evidence, the court concludes" that "the state court's finding that Hall is not mentally retarded was not unreasonable."[15]

The district court also addressed Hall's claim for a jury determination of mental retardation or, in the alternative, a live hearing. The district court found that Hall "failed to raise this issue in the state proceedings" and that it was procedurally defaulted.[16] This conclusion is incorrect; Hall consistently raised this issue in his state and federal habeas petitions. The district court went on to hold that "[e]ven if not procedurally defaulted, Hall's claim that he was entitled to a jury determination on mental retardation is without substantive merit. Nowhere in *Atkins* does the Supreme Court hold that a jury determination on this issue is required."[17] This conclusion is correct, but it misses a central element of Hall's claim-namely, that Hall requested a jury trial or at minimum a live hearing.[18]

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[14] *Hall v. Quarterman*, 443 F. Supp. 2d 815, 821 (N.D. Tex. 2006) (internal citations omitted).

[15] *Id.* (citing 28 U.S.C. § 2254(d)(2)).

[16] *Id.* at 822.

[17] *Id.*

[18] Hall argued in his federal habeas petition, "At the very least, this court should order an evidentiary hearing on this issue [of mental retardation] so that Mr. Hall finally has an opportunity through counsel to present testimony on his behalf and to confront and cross-examine the state's witnesses on mental retardation. The evidence already in the record that

In reviewing the paper evidence, the district court failed to account for several clearly erroneous findings of the CCA which, if addressed in an evidentiary hearing, might have highlighted the unreasonableness of the state court's determination of the facts and entitled Hall to habeas relief. The CCA's habeas determinations rested on the state court's findings from the paper hearing, as the CCA fully adopted those findings.[19] In other words, errors in the state court's factual findings were not corrected when they reached the CCA. In assessing the affidavits of experts, which address Hall's IQ, the state court misread an IQ score of 67 reported in Dr. Church's sworn affidavit, replacing a Wechsler Adult Intelligence Scale, third edition, exam ("WAIS-III") score of 67 with 72. The state's expert, Dr. Price, also erroneously relied on an IQ score of 72 in making his assessment, stating, "[I]f an individual is being

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demonstrates Mr. Hall's mental retardation is summarized below."

[19] On direct appeal, the CCA likewise relied on the state habeas findings and conclusions. Specifically, it took judicial notice of the prior state habeas proceeding and its outcome and stated that its "conclusion on direct appeal [was] necessarily the same as [its] conclusion in the habeas proceedings." *Hall*, 160 S.W.3d at 39. And, even in re reviewing the evidence in "an abundance of caution," the CCA still deferred to the trial judge's habeas findings. *Id.* at 40 ("While there was significant evidence in favor of a finding of mental retardation, there was also significant evidence against such a finding. The trial judge, who presided over the trial and the habeas proceedings, was in the best position to evaluate the conflicting evidence. Her findings, which we have judicially noticed in the current direct appeal, deserve great deference.").

assessed for the presence or absence of mental retardation and receives and [sic] IQ score of 72, then his or her actual IQ is 95% likely to fall between 67 and 77-a range of scores that may indicate mild mental retardation or borderline intelligence."[20] Relying at least partially on this error, the state trial court concluded that Hall's intelligence level was "either in the borderline range of intellectual functioning or in the upper end of mild mental retardation."[21] A hearing would clarify whether Dr. Price's conclusions with respect to Hall's IQ, which influenced the state court's finding, were premised on factual error.

The state trial court also made erroneous findings with respect to the credibility of at least one of Hall's

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[20] The state notes that it was Hall's expert, Dr. Denkowski, who initially misstated Hall's final IQ score as 72 rather than 67. The state submits that this error was harmless because the state court discounted his affidavit, and the CCA on direct appeal noted correctly that Dr. Church's examination established an IQ of 67. *Cf. Ylst v. Nunnemaker*, 501 U.S. 797, 801-05, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) (explaining that courts look to the "last reasoned decision" of the state court in determining whether a state procedural bar precludes federal-court review). However, Hall's claim is that this erroneous recitation affected Dr. Price's overall characterization of Hall's general intellectual functioning. Consequently, neither Denkowski's affidavit nor the CCA's recitation of the correct post-conviction IQ score would render the error harmless.

[21] The state trial court never indicated which of Hall's IQ scores was most reliable. Instead, it only stated that the scores revealed that Hall was of borderline intelligence or mildly mentally retarded.

experts[22]-an expert whose testimony was central to Hall's allegations of limited adaptive functioning.[23] The state concluded that Dr. Church's submission should "not be given weight" because Texas law does not permit individuals with Dr. Church's credentials to make mental health determinations. Texas' Persons with Mental Retardation Act only permits physicians or psychologists licensed in Texas or certified by the Texas Department of Mental Health and Mental Retardation to make such determinations.[24] Yet this Act is inapplicable in the *Atkins* context, and the state court's conclusion to the contrary was clearly erroneous. "The PMRA, by its own terms, is irrelevant to the application of *Atkins*. For Eighth Amendment purposes, it neither defines mental retardation nor more relevantly establishes who may diagnose mental retardation."[25]

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[22] State credibility determinations also receive AEDPA deference on habeas review, but not when overcome by clear and convincing evidence. *See Summers v. Dretke*, 431 F.3d 861, 871 (5th Cir. 2005); 28 U.S.C. § 2254(e)(1); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) ("A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.").

[23] Dr. Church, a licensed psychologist in Oklahoma, testified in her affidavit that it is "highly doubtful that [Hall] alone could meet the needs of his day to day life."

[24] TEX. HEALTH & SAFETY CODE § 591.003(16).

[25] *In re Hearn*, 418 F.3d 444, 447 (5th Cir. 2005); *see also Ex parte Lewis*, 223 S.W.3d 372, 374 (Tex. Crim. App. 2006) (Cochran, J., concurring) (joining the majority in declining to adopt the trial court's fact findings based on TEX. HEALTH & SAFETY CODE § 591.003(16) and explaining that whether a physician or psychologist is licensed in Texas is of no "legal

The issue of mental retardation, defined by *Atkins* only after Hall was tried and defined by Texas only after Hall's paper "hearing" on mental retardation, is fact-intensive and rests on nuanced determinations under broadly stated concepts such as "limitations in adaptive functioning." If Hall can prove the facts that he has consistently alleged on appeal, he will be entitled to habeas relief.[26]

Furthermore, the state court's erroneous factfinding and its refusal to accept more than paper submissions despite the development of a new constitutional standard and a lack of guidance from the state on that standard, deprived Hall of a full and fair hearing at the state level. Although we have found paper hearings adequate where "the trial court and the state habeas court were one in the same," as was the case here, there is a crucial distinction. Following trial, the state trial judge on habeas review faced a new constitutional rule categorically barring the execution of mentally retarded persons. *Atkins* was so new that Texas had not had time to establish a definition of mental retardation or the associated burdens of proof.

Nor were the district court's findings of "facts" from the disputed assertions of affidavits below adequate. As we have discussed, some of these accepted "facts"

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significance in deciding whether [an] applicant is mentally retarded for purposes of eligibility for the death penalty under *Atkins v. Virginia* or *Ex parte Briseno*").

[26] *See Schriro*, 127 S. Ct. at 1940.

were both critical and incorrect.[27] These errors would have been drawn out in a hearing with an opportunity of counsel to examine the witnesses. Other of the district court's conclusions rely heavily on the conflicting expert opinions of psychologists, asserted in affidavits unaired in court and shielded from cross examination. Given the material errors in credibility determinations and factfinding at the state level, we are persuaded that the determination of Hall's claim, caught in the immediate uncertainty following *Atkins*, was so freighted with a risk of error in fact finding that the failure of the district court below to conduct a meaningful hearing was an abuse of discretion in these unusual and unique circumstances.

III

Accordingly, we VACATE the judgment of the federal district court and REMAND to that court for further proceedings including an evidentiary hearing.

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[27] Dr. Denkowski's affidavit, upon which the trial court relied in finding that Hall was not mentally retarded, indicated incorrectly that Dr. Church's examination of Hall produced an IQ score of 72; the score was in fact a 67. Additionally, the state posited in its reply to Hall's state habeas petition that Hall, while in prison, wrote a note that said, "You have to get me out of here because there's no call button. The sink is stopped up. Also there are roaches and a small ass bed. My feet go all the way to the wall because I'm six feet four." The document actually reads, as Hall's attorneys point out in their briefing: "you half to get out of here because there is No call button, the senk is stopd up also rauch's and small ass bed by feet go all the way to the wall because I am 6f4."

PATRICK E. HIGGINBOTHAM, Circuit Judge, concurring in part and dissenting in part:

The Supreme Court left implementation of *Atkins* to the states, a license that implicitly insists upon faithfulness to its core holding and the constitutional constraints of due process. I am persuaded that because the state denied Hall the right to confront and cross examine state witnesses in the adjudication of his claim of retardation, Hall's death sentence was contrary to and involved an unreasonable application of the clearly-established federal law of due process as determined by the Supreme Court of the United States.

Michael Wayne Hall was convicted of capital murder by a Texas jury and sentenced to death in 2000. Much of his mitigation case rested on the claim that Hall suffered from a learning disability. The Texas Court of Criminal Appeals affirmed the conviction and sentence, rejecting Hall's *Penry* argument that the jury could not give expression to his mitigation evidence and his claim that execution of mentally retarded persons is unconstitutional. Hall filed a petition for certiorari with the Supreme Court and sought collateral habeas review with the state court.[1] There he continued his contention that it was unconstitutional to execute a mentally retarded individual-the issue presented in the *Atkins* case-which was then *sub judice* in the Supreme Court. Before the state answered his state habeas petition,

[1] He filed his petition for certiorari in June of 2002 and his state application for writ of habeas corpus in January of 2002.

the Supreme Court held in *Atkins* that executing mentally retarded individuals violates the Eighth Amendment. Despite *Atkins*, the trial court on habeas refused over Hall's objection to conduct an evidentiary hearing[2] to determine whether Hall was mentally retarded, refusing Hall the opportunity to cross examine witnesses. Rather, it recommended that the CCA reject Hall's state habeas claim, relying upon the record from his original trial and affidavits submitted by order of the trial court. No live testimony was taken, and Hall was not allowed to cross examine any of the affiants despite the introduction of many new affiants and claims that had not been tested at trial. In May of 2004, addressing the Supreme Court's opinion vacating and remanding the judgment of the CCA,[3] which had rejected the *Atkins* claim on Hall's direct appeal, a divided CCA repaired to the same record and again concluded that Hall was not mentally retarded. Hall again petitioned the Supreme Court for certiorari, which the Supreme Court denied in June of 2005. Hall then filed his federal habeas claim, again

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[2] Of course a proceeding before a state or appellate court where the parties may argue an issue is a "hearing." *See Sumner v. Mata*, 449 U.S. 539, 546, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). But *Sumner* addressed 28 U.S.C. § 2254(d) and the deference due findings of fact by a state court in federal habeas, and did not address the elements of a hearing the state was constitutionally compelled to provide to sustain a criminal conviction.

[3] The Supreme Court's opinion granting certiorari and vacating and remanding the CCA's judgment was decided on October 7, 2002, but the CCA decided Hall's state habeas claim first, in February of 2003, not addressing the remand from the Supreme Court until 2004.

requesting a hearing on the *Atkins* issue. Without holding a federal evidentiary hearing, the U.S. district court deferred to the state adjudication.

I

Michael Wayne Hall was 18 years old when he killed Amy Robinson, a mentally retarded co-worker at a grocery store.[4] Hall had low intelligence and lived in a chaotic family environment. He had never been incarcerated, although he had participated in minor shoplifting incidents with other individuals. Hall often associated with people younger than his age but he met an older friend, Robert Neville, in 1997. He appreciated Neville's friendship and attention and spent many hours with him, accepting his offers of gifts, rides, and places to stay, and imitating his style of dress. Neville persuaded Hall to quit his job so they could work together at a grocery store. They decided to kill someone. With purchased weapons, they killed Amy, an easy target. Police arrested them attempting to walk to Mexico several hundred miles away.

The trial commenced in February of 2000. The state presented, *inter alia*, a videotape that the media had taken of Hall, Hall's written statement to the police, the arrest warrant, the weapons, photographs of the area where the victim was found, and testimony of the agents and detectives who questioned Hall and took his statement. There were vague references to

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[4] To provide context, much of this account of the case history will repeat the recitation of the panel opinion.

Hall's acuity throughout this portion of the trial, but they were not drawn out. At one point, an agent indicated that detectives had asked Hall to take a polygraph test, but he said that "he couldn't take it, his mind was kind of messed up." The attorney cross examining the agent asked if Hall had expanded on this statement, but the agent replied in the negative. The attorney also inquired about the competency of the writing-grammar and spelling, for example-in Hall's statement, as well as Hall's ability to communicate with the agent (whether there was anything "unusual about his understanding of events or how he told them" to the agent). The defense asked a detective involved in the case whether Hall's family members had indicated that Hall had any mental disabilities and if this was consistent with the detective's impressions of Hall. The detective replied briefly that, "[i]f I recall, [Hall's stepbrother] said he was slow," and that according to the detective, "he was not the most intelligent person I had ever seen, but he's also not the dumbest person I had ever seen, either." On the third day of trial, the jury found Hall guilty.

In the sentencing phase of the trial, the defense offered evidence of Hall's learning disability. Hall's mother and brother testified about mental problems and learning disabilities in the family, Hall's struggles to perform typical childhood tasks, childhood injuries to his head, and later difficulties when he started work and attempted to socialize

with colleagues.[5] In addition to testimony from Hall's family, Hall's teachers and psychologists discussed his mental capacity at school.[6] The school psychologist and experts discussed various results

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[5] Mrs. Hall discussed mentally retarded cousins, Hall's grandfather who was mentally ill and hospitalized, and three of Hall's father's siblings who were "learning disabled and received special education assistance." As a child, Hall had trouble doing simple tasks such as stacking blocks, and when he got older, he often associated with younger children because children of his own age would "call him stupid and retarded." When Hall was a child, a pickup truck converted to a trailer fell on Hall's head, another child struck him on the head with a baseball bat, Hall once struck his head when he fell out of a car, and he received stitches over his eye after an incident in a rocking chair. As an adult, he is unable to tell time from an analog clock, he drools when he eats, and tears his food apart with his hands rather than cutting it with a knife. He was demoted from his job as stocker at the grocery store to the position of "bagger," since he was unable to properly stack small boxes of food on the shelves. Although he had a driver's license, he had initially failed the written test and only passed after his mother worked with him closely for three days. Hall's brother testified that Hall became lost and disoriented when his brother drove him several blocks from his house and dropped him off at a friend's mother's house.

[6] His wood shop instructor indicated that Hall had difficulty with "simple tasks." While most of his special education students were able to complete an assignment within three weeks, it took Michael approximately eight weeks. Dr. Conner, the school psychologist, indicated that although Hall tried to talk in class, he would often only repeat phrases that he had heard students say in the hallway. Hall read at approximately a third-grade level and had a comprehension level of a first grader. When Dr. Conner recommended additional psychological testing, Hall's mother resisted the testing. A special education teacher testified that Hall did subtraction using "stick figures." This teacher "guessed" that Hall's IQ was in the upper 60's.

from Hall's IQ tests, ranging from 67 to 71 for full scale IQ tests[7] but differed as to their significance, reliability, relevance, and margin of error.[8] Several experts also testified generally as to Hall's adaptive functioning and knowledge, and his academic abilities. Dr. Cunningham assessed Hall's adaptive functioning,[9] concluding that the tests indicated that Hall was learning disabled, with "significant academic deficiency." Dr. Price assessed Hall's

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[7] Dr. Conner, Hall's school psychologist, testified that the school had classified Hall first as mentally retarded and later as learning disabled, and that his IQ was 84 on the Test of Nonverbal Intelligence (a non full scale IQ test, which she testified is usually ten points higher than a nonverbal intelligence test) and a 71 on the Weschsler Intelligence Scale for Children Revised test in 1991. Dr. Cunningham, Hall's expert witness, administered a WAIS III IQ Test when Hall was 20 years old and shared the test with Dr. Price, the state's expert psychologist. The test indicated that Hall's IQ score was 67, and with standard error, fell within a range of 64 to 70.

[8] Dr. Cunningham indicated that the school's initial classification of Hall as mentally retarded in 1988, followed by a re-classification to learning disabled in 1991 when he received an IQ score of 71 (with a 90 percent likelihood that the score ranged from 66 to 76) may have resulted from the school's erroneous interpretation of the margin of error for the 1991 test. He also discussed the danger of relying on the TONI test as an IQ score. Dr. Price, the state's expert, testified that the confidence range for the school's WAIS III test from 1991 was, assuming a 90 percent confidence interval, approximately 68 to 74 for the full scale IQ (not 66 to 76, as Dr. Cunningham had described the score results), and that Dr. Cunningham's IQ test results for Hall at age 20, in a "fuzzy" range, could have been "a 70" "[o]r a 71."

[9] Dr. Cunningham assessed adaptive functioning based on interviews with three informants and concluded that his composite standard score for the test was a 59 lower than the IQ of 67 that he assessed when Hall was 20.

adaptive knowledge (not adaptive functioning, which is the applicable issue under the *Briseno*[10] test for *Atkins* mental retardation) using a Street Survival Skills Questionnaire,[11] indicating that Hall was "slow on a lot" of the questions but that his intelligence was "either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded." Dr. Price concluded, "it's sort of a judgment call."

Finally, the state presented lay witnesses who had some past contact with Hall. A fellow grocery store employee of Hall's testified that Hall taught him how to bag groceries, said that he had worked with mentally challenged children, and indicated that he did not notice anything slow about Hall. A waitress who had once served food to Hall and Neville in a restaurant after the murder testified that Hall ordered food for himself and that she did not notice him picking up food with his hands, although she did not discuss whether or not he was able to use a knife.

In their closing arguments to the jury, the state and the defense focused exclusively on Hall's mental capacity as it related to mitigation. The state argued that Hall was "at worst mildly retarded" and that this was not mitigating, since he was "smart enough" to choose a trusting victim. Hall's attorney only discussed his IQ in the broad sense (discussing one

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[10] *Ex Parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).

[11] On cross examination, he admitted that "adaptive functioning," as assessed by Dr. Cunningham, and "adaptive knowledge," which he tested, are distinct types of evaluation.

teacher's estimation that it was "somewhere in the 60s," and how the experts could not agree on a "precise" IQ number) and emphasized Hall's mental capacity in light of his inability to understand the wrongness or "grasp the horribleness" of his crime. The state, in its final rebuttal, argued: "does it really matter to us, other than for labeling purposes, whether he's labeled as mild mentally retarded or low normal? Does that really tell us anything that we need to know or help us in determining is this a mitigating factor?"

The jury answered "no" to the question of whether there were mitigating circumstances to spare Hall's life. On automatic appeal, the CCA affirmed the trial court's conviction and sentence on January 16, 2002,[12] rejecting Hall's contention that it is unconstitutional to execute mentally retarded persons. On January 17, 2002, Hall filed a state application for a habeas writ, re-emphasizing his argument that "[t]o inflict a death sentence on a person suffering from mental retardation" violates Article 1, § 12 of the Texas Constitution and Eighth Amendment of the U.S. Constitution, an issue that was then before the Supreme Court in *Atkins*. He requested a full and fair hearing, a "live" hearing.[13]

On June 10, 2002, Hall petitioned the Supreme Court for a writ of certiorari on the mental

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[12] *Hall v. State*, 67 S.W.3d 870, 872 (Tex. Crim. App. 2002).

[13] Specifically, Hall requested an "evidentiary hearing" in his original state habeas petition and a "live hearing" in his objection to the state trial court's writ hearing procedure.

retardation issue, seeking review of the CCA's judgment on direct appeal affirming his conviction and sentence. On June 20, 2002, the U.S. Supreme Court in *Atkins* held that the "[Eighth Amendment of the] Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender,"[14] thus setting a constitutional bar against the execution of mentally retarded individuals.[15]

The state filed its reply to Hall's state habeas application on July 16, 2002, acknowledging the *Atkins* decision but maintaining that the trial court's procedure for determining mental retardation was adequate.[16] The habeas trial judge, who had also presided over the original trial, refused to order a hearing or to allow cross examination of experts on the new *Atkins* issue, announcing that the issue would be submitted based on affidavits and the trial record. Hall again objected, urging that the court conduct a live hearing. The parties submitted affidavits from Dr. Price and Dr. Cunningham, as

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[14] *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[15] The Supreme Court granted Hall's petition on October 7, 2002.

[16] In its original reply to Hall's habeas petition, the state urged that "[t]he Court expressly left to the states the task of developing appropriate ways to enforce the constitutional restriction ... and offered no guidance for determining which capital offenders fall within its purview." In response to Hall's motion to stay the state proceeding, the state continued, "The mitigation special issue allowed the jury to consider whether Applicant's mental retardation, if any, was of such a degree to avoid imposition of the death penalty ...."

well as affidavits from many individuals who had not testified at trial, including psychologists Dr. Denkowski and Dr. Church, an advocate for mentally retarded death row inmates, prison guards, a mitigation specialist, investigators who assisted Hall with his habeas claim, an inmate who resided next to Hall on death row, more of Hall's teachers, and Hall's trial counsel.

Free of cross examination, experts presented new evidence of Hall's IQ and further disputed the margin of error associated with the various IQ scores. These IQ scores included the school's WISC-R result of 71 with a measurement error of 2.6, when Hall was 12 1/2 years old; Dr. Cunningham's WAIS-III test, which resulted in Hall's score of 67 at age 20; Dr. Church's WAIS-III test at age 22, which again showed a score of 67 (wrongly reported by Dr. Denkowski as a 72); and TONI-2 and TONI-3 scores of 84 and 77 at ages 16 and 20, respectively (with associated information that the TONI "yields a 7-point higher score than the WISC-R Full Scale IQ" and does not measure general intellectual functioning). Dr. Price's affidavit discussed the IQ findings from the original trial but presented new allegations regarding the proper standard for determining mental retardation under *Atkins*, and how his testing related to this standard. He criticized Dr. Denkowski for basing his affidavit on records rather than a personal examination of Hall but indicated that he and Dr. Denkowski "basically agree on the current working definition of mental retardation that is used by the psychological community (i.e., IQ below approximately 70 with

measurement error considered, significant adaptive behavior deficits in 2 or 3 skill areas, and origination of these factors in the developmental period.)" Dr. Price also described the results of his adaptive knowledge testing of Hall. He alleged that "Mr. Hall's knowledge of adaptive behavior ranged from the borderline level (16th percentile) in several areas (understanding and telling time, handling money, and using common measurements) to the average level (8th to 63rd percentile) in other areas" ("recognizing and understanding basic spatial/quantitative concepts, functional signs, tools, kitchen utensils, hygiene, safety skills, and the use of public services"). He did not indicate whether any of the tests demonstrated that Hall was below borderline. Dr. Price also alleged: "It is very important to note that Michael Hall was placed in special education due to having been classified as having a learning disability-not mental retardation .... [M]y review of this case does not clearly indicate that Michael Hall is mentally retarded." Yet he concluded elsewhere that "[i]t is obvious that the issue of the diagnosis of mild mental retardation is controversial and determining whether or not someone receives that diagnosis can *literally turn on a word or a number.*"[17]

Dr. Denkowski's affidavit explained that he did not interview Hall because a meeting in a high security prison would "not provide reliable information for gauging [Hall's] functional status." He contested Dr. Price's IQ data, indicating that "Dr. Price ...

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[17] Emphasis added.

misrepresented Mr. Hall's SSSQ [adaptive behavior] data through tacit implication that they were contrasted with those of typical adults," whereas in reality the test derives "adult norms" from "two secondary school prevocational programs in Indiana and Texas." Dr. Denkowski concluded that "how Dr. Price presents SSSQ data is unacceptable for any diagnostic purpose, even outside the courtroom" and that Dr. Price's other adaptive skills test, the K-FAR, showed that Hall's math skills were "less competent than those of 99% of typical same-aged persons" and that his reading skills were "less proficient than 95% of people of his age." Dr. Denkowski also examined relevant authorities that determine mental retardation under *Atkins* in Texas, concluding that the relevant numbers required for a finding of mental retardation of a defendant in Texas are a "WAIS-III full scale IQ" below 75,[18] "significant adaptive behavior deficits must exist in three skills areas and the measurement error adjusted standard score for the overall instrument must be below 71," and "[t]hese impairments must have originated prior to the 18-22 age range." Further, he found that "[s]ince Mr. Hall's IQ and adaptive behavior quality plainly fall within the area that the DSM-IV and Texas law consider to define mental retardation, it seems reasonable to express confidence in his diagnosis of mental retardation." Hall's adaptive behavior tests indicated that his behavior was "of the quality of higher-level mentally retarded adults." Dr. Denkowski also emphasized that Texas's definition

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[18] This is, of course, not the *Atkins* standard that *Briseno* later established.

of mental retardation recognized only a WAIS test for IQ determination, since only that test "yield [s] a 'full scale intelligence quotient' " and that the TONI test (which had been discussed at trial) does not yield an actual IQ or assess general intellectual function, thus making it useless for diagnosing mental retardation in Texas. Most significantly, Denkowski's affidavit, upon which the trial court relied in finding that Hall was not mentally retarded, indicated incorrectly that Dr. Church's examination of Hall produced an IQ score of 72; the score was in fact a 67. Dr. Denkowski's affidavit, in addition to commenting on other experts' evaluations of Hall, discussed the weaknesses of the state's lay witness affidavits as well as some of the state's claims regarding mental retardation.

There were gaps and inconsistencies throughout the record; we mention only a small sample here. The state posited in its reply to Hall's state habeas petition that Hall, while in prison, wrote a note that said, "You have to get me out of here because there's no call button. The sink is stopped up. Also there are roaches and a small ass bed. My feet go all the way to the wall because I'm six feet four." The document actually reads, as Hall's attorneys point out in their briefing: "you half to get out of here because there is No call button, the senk is stopd up also rauch's and small ass bed by feet go all the way to the wall because I am 6f4"." This cleaning up of a statement lies buried in the paper records but would have been brought to light by any trial lawyer given the opportunity to cross examine the opposing party. Mr. Harris, one of Hall's trial attorneys, indicated in an

affidavit that Hall's defense team had chosen not to reveal the victim's IQ score, since she was clearly an innocent victim. However, the state at trial had focused strongly on how Amy was mentally impaired and was clearly more mentally impaired than Hall.[19] In fact, as Mr. Harris's affidavit reveals, her IQ of approximately 83 (the exact number remains unclear, as it was only put forth on paper) was meaningfully higher than Hall's.

Hall's affidavits from teachers alleged that he drooled in class, that he had "extreme difficulty speaking complete sentences," and that he had trouble spelling his own name. An affidavit of a mitigation specialist appointed to Hall's case indicated that Hall did not understand the appeal or how the attorney would help him with the appeal. He could only communicate basic information about himself, such as his name and his mother's name, and that, during the interview, "Hall would agree with or go along with whatever he thought [the mitigation specialist] wanted him to say." Finally, he

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[19] The state asked a fellow grocery store worker if Amy had the "same capabilities" as Mr. Hall, in terms of bagging groceries and carrying them to customers' cars and asked, "So when you compare the two of them, who was slower?" and "Mentally, what kinds of things did you see about her that were slow?" The state asked the jury in its closing arguments, "[I]sn't it interesting that the very quality, the very quality that made Amy Robinson the perfect target, the very quality that enabled this Defendant to deceive ... someone who truly was mentally challenged, that very quality is now the quality he wants to cling to .... That he chooses someone who was more mentally challenged by everyone's account, by everyone's account, but himself ...."

indicated that Hall mispronounced words or used them out of context and appeared to use words that he did not understand "in an attempt to mask or hide his disabilities."

The state filed "affidavits" of prison staff, all of which appeared to have been similar "fillable forms" employed by a state investigator. The affidavits alleged that Hall appeared "normal" to the guards and that he could follow instructions. To demonstrate experience with mental illness, one guard wrote that he "knew some kids in school with Down's syndrome," while another said that he had an uncle who was mentally retarded. Dr. Denkowski pointed out that the observations of teachers and prison guards, indicating that Hall was able to obey, follow rules, and function and cope, were painted by the state as indications of Hall's mental capacity but in fact simply affirm that "Hall has long demonstrated the capacity to learn and abide by institutional rules and expectations," as many mildly mentally retarded persons are capable of doing.

Additional papers presented by affidavit included Hall's medical records (showing various incidents such as a fall on the sidewalk resulting in an abrasion to his mouth and cuts that resulted from glass falling on Hall), grade reports and special education/disability documents from school, prison medical and other records, the results of a psychiatric examination to determine Hall's competency to stand trial (indicating that Mr. Hall "presented his charge very well" but that "[h]e could perform only two of the four basic elementary

mathematical functions"), and psychology texts, such as the American Association on Mental Retardation's book entitled, *Mental Retardation: Definition, Classification, and Systems of Supports.*

The CCA relied entirely upon these affidavits and the original trial court record in reviewing Hall's habeas claim of mental retardation,[20] which was now controlled by the decision of the Supreme Court in *Atkins.* The CCA adopted the trial court's paper findings in full-at least one of which was based on an erroneous conclusion of law[21]-on February 26, 2003,

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[20] *See Hall v. Texas*, 160 S.W.3d 24, 27-28 (Tex. Crim. App. 2004) ("On August 5, 2002, in the habeas action, the trial court designated the issue of whether appellant was mentally retarded as a previously unresolved fact issue and ordered a hearing by way of affidavit ... after reviewing the trial record and the affidavits submitted by the parties, and relying upon personal recollection of the events occurring at trial, the habeas trial court adopted the State's proposed findings of facts and conclusions of law, concluding that appellant is not, in fact, mentally retarded ... we denied relief in the habeas application in an order adopting the trial court's findings.").

[21] The state findings, which the trial court adopted, had held that Dr. Church's submission should be disregarded, since Dr. Church was licensed in Oklahoma and not Texas. This finding erroneously confused the licensing requirements for persons testifying about mental retardation in civil commitment hearings with those of experts testifying on mental retardation. The only time that any judge of this court has implied that a Texas license may be required for an expert to testify on an *Atkins* claim was in dissent, which relied on the Texas Health and Safety Code's definition of mental retardation based on a Texas licensed physician's or psychologist's determination of mental retardation-a code which is meant to protect persons in civil commitment hearings. *See Hearn v. Dretke*, 376 F.3d 447, 468 (5th Cir. 2004) (Smith, J., dissenting).

and denied Hall's habeas application.[22] The CCA then rejected the mental retardation claim a second time on the Supreme Court remand of Hall's direct appeal case[23] but once again it simply adopted the trial court's findings based on the paper record and relied solely on its habeas findings and portions of its original case affirming Hall's conviction, as well as a "re-review[ ]" of the record evidence, to conclude that Hall was not mentally retarded.[24] The court considered no new evidence in these trials and ordered no hearing on the *Atkins* issue. It justified its actions by arguing that the process was sufficient:

> [T]he trial court and this Court did have the benefit of *Atkins* during the habeas proceedings. The parties had ample opportunity to present evidence at that time on the specific issue of mental retardation. And we can consider the habeas proceedings and evidence in the current posture of this appeal ... we are faced in a direct appeal with an issue that has already been presented to us on habeas corpus. Consequently, we address appellant's mental retardation in light of both the direct appeal and the habeas records ... we believe that taking judicial notice of the habeas proceeding and its outcome satisfies the Supreme Court's

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[22] *Ex parte Hall*, No. 53,668-01, slip. op. at 1-2 (Tex. Crim. App. 2003).

[23] *Hall v. Texas*, 537 U.S. 802, 123 S. Ct. 70, 154 L. Ed. 2d 4 (2002).

[24] *Hall v. State*, 160 S.W.3d 24, 39-40 (Tex. Crim. App. 2004).

remand order in the present case.[25]

The dissenting justices disagreed with the "unique" precedent the court elected to follow to determine the *Atkins* claims on remand of the direct appeal, emphasizing that "[n]o trier of fact in this case has ever heard live testimony, subject to testing on cross examination, on the specific issue of whether appellant is mentally retarded."[26] The dissent concluded, "[W]e will never know [whether Hall is mentally retarded] unless we order [a] full hearing and have before us both the tested testimony of persons who are knowledgeable in the mental-health field and relevant lay testimony about his adaptive behavior."[27]

In June of 2006, Hall filed a federal habeas petition after the Supreme Court had denied his petition for certiorari.[28] He again specifically argued that the denial of a full evidentiary hearing denied him due process rights, stating, "Mr. Hall has a right under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a full and fair hearing in a court of law on the issue of his mental retardation." The federal district court, like the state trial court and court of appeals, refused to conduct an evidentiary hearing or to allow cross examination of the state

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[25] 160 S.W.3d at 37-38. The statement that the parties had "ample opportunity to present evidence at that time" ignored the state trial court's rejection of Hall's request for a hearing.

[26] *Id.* at 41 (Johnson, J., joined by Holcomb, J., dissenting).

[27] *Id.* at 44 (Johnson, J., joined by Holcomb, J., dissenting).

[28] *Hall v. Texas*, 545 U.S. 1141, 125 S. Ct. 2962, 162 L. Ed. 2d 891 (2005).

experts on the *Atkins* claims, denying the claims, deferring to the state adjudication under AEDPA, and conducting its own examination of the paper record.[29] We granted a certificate of appealability on the *Atkins* claim.

II

Our decisions have accorded deference to state adjudications of claims for habeas relief from state criminal convictions under AEDPA even if made without a live hearing.[30] Under AEDPA there is a presumption that the state court's findings of fact are accurate "unless the petitioner can rebut the findings of fact through clear and convincing evidence."[31] Following this line of deference, in *May*[32] and similar cases both before and after AEDPA, we have found that where the trial judge who presided over the initial case later considers the habeas claim, we presume that reliance upon the completed record is acceptable.[33] This is sensible in many cases, at least those in which the trial judge experienced first-hand evidence directly relevant to the habeas issue. Due process requires a hearing, not two. Despite the

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[29] *Hall v. Quarterman*, 443 F. Supp. 2d 815 (N.D. Tex. 2006).

[30] *Valdez v. Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001).

[31] *Id.* at 949.

[32] *May v. Collins*, 955 F.2d 299, 314 (5th Cir. 1992).

[33] *See, e.g., Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000) ("[W]e have repeatedly found that a paper hearing is sufficient to afford a petitioner full and fair fearing on the factual issues underlying the petitioner's claims, especially where, as here, the trial court and the state habeas court were one in the same.").

deference that we give the adjudication of state courts under AEDPA, this court has highlighted post AEDPA-that " '[t]he fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner".' "[34] This said, allowing the original trial judge to proceed without an evidentiary hearing or live cross examination finds trouble when a central constitutional principle changes between the initial trial court decision and that same court's decision of a habeas claim-acutely so where the claim turns on sharply contested issues of fact and witness credibility.

AEDPA provides,

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of

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[34] *Fable v. Cornyn*, 231 F.3d 193, 196 (5th Cir. 2000) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

> the evidence presented in the State court proceeding.[35]

The Supreme Court has explained that AEDPA does not "require the federal courts, including this Court, to defer to state judges' interpretations of federal law."[36] Rather, our duty is to make an " 'independent evaluation' " of "whether or not a rule is clearly established at the time a state court renders its final judgment of conviction."[37] A state court decision is contrary to clearly established federal law in two instances-first, where it is "diametrically different, opposite in character or nature, and mutually opposed to [the Supreme Court's] clearly established precedent,"[38] and second, where a "state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from our precedent."[39] Under AEDPA, "state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated."[40]

We must decide whether the state court's decision to

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[35] 28 U.S.C. § 2254(d).

[36] *Williams v. Taylor*, 529 U.S. 362, 377, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

[37] *Id.* at 382, 120 S. Ct. 1495 (quoting *Wright v. West*, 505 U.S. 277, 305, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (O'Connor, J., concurring in judgment)).

[38] *Id.* at 406, 120 S. Ct. 1495 (quotations omitted).

[39] *Id.*

[40] *Id.* at 388, 120 S. Ct. 1495.

deny Hall the right of confrontation and cross examination in determining whether he was mentally retarded under *Atkins* was contrary to federal law. Looking to federal law of due process and the right of cross examination and confrontation as announced by the Supreme Court, I am persuaded that the relevant law is clear, and dictates the conclusion that the state court's decisional process was contrary to this clearly-established law. The life or death of a defendant, determined without hearing cross examination to resolve disputed material facts, here violates the core principles of due process and Hall's right of confrontation as announced by the Court.

It is helpful to lift up the questions that either are not presented or have otherwise been dispositively decided. I accept here the state's refusal to grant a jury trial on the issue of mental retardation. Hall asked for a jury trial, but he also maintained that given the posture of the case, due process assured him more than a submission "on the papers." I also give full force to the Supreme Court's holding in *Atkins* and in *Ford v. Wainwright* leaving "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,"[41] while addressing the constitutional minimum required of the state proceeding. The relevant question to my eyes is the process required by federal law for the death

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[41] *Atkins*, 536 U.S. at 317, 122 S. Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)).

eligibility determination made here, and whether the state court's process directly conflicts with this law.[42]

The inquiry could begin and end with *Ford*, but it is helpful to ground this case in its place within the larger stream of due process precedent. *Atkins* holds that "the mentally retarded should be categorically excluded from execution"[43] and that "death is not a suitable punishment for a mentally retarded criminal";[44] *Ford* establishes a "bar against executing a prisoner who has lost his sanity."[45] While the factors establishing insanity and mental retardation differ and, under each case, are established by the state,[46] the result of the constitutional

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[42] *See Williams*, 529 U.S. at 382, 120 S. Ct. 1495 (holding that "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule .... 'If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule .... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.' " (quoting *Wright v. West*, 505 U.S. 277, 308-09, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (Kennedy, J., concurring in judgment))).

[43] 536 U.S. at 318, 122 S. Ct. 2242.

[44] *Id.* at 321, 122 S. Ct. 2242.

[45] 477 U.S. at 406, 106 S. Ct. 2595.

[46] The Florida standard for insanity in *Ford*, for example, was whether " 'the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him.' " *Id.* at 412, 106 S. Ct. 2595 (quoting Fla. Stat. § 922.07 (1985 and Supp.1986)).

determinations required by *Ford* and *Atkins* is identical: both determinations, if established in the affirmative, render a defendant ineligible for a death sentence.

Ford was convicted of murder and sentenced to death in Florida.[47] Following trial and sentencing, Ford began to exhibit strange behavior and eventually became incomprehensible, speaking in a code known only to him. A psychiatrist diagnosed him with paranoid schizophrenia.[48] His counsel requested that the state determine Ford's competency. The Governor appointed a panel of three psychiatrists to determine Ford's competency. Ford had one, thirty-minute meeting with the psychiatrists who collectively questioned him. Each then wrote a short report concluding that he had some form of psychosis but was competent to understand the death penalty and its consequences. Armed with these reports, the Governor decided that Ford was not insane and signed Ford's death warrant.[49] The state court denied Ford's request for a hearing on his insanity. A district court, on habeas review, denied Ford's petition for an evidentiary hearing on insanity.[50]

The Supreme Court found that since "the Eighth Amendment has been recognized to affect significantly both the *procedural* and the substantive aspects of the death penalty," the adequacy of the

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[47] 477 U.S. at 401, 106 S. Ct. 2595.
[48] *Id.* at 402-03, 106 S. Ct. 2595.
[49] *Id.* at 403-04, 106 S. Ct. 2595.
[50] *Id.* at 404, 106 S. Ct. 2595.

procedures for determining Ford's insanity rested on whether or not the Constitution barred the execution of an insane prisoner.[51] In other words, a determination that the Constitution substantively bars the execution of certain types of people brings due process concerns to the forefront-with the substantive guarantee came assured procedures.[52] Having determined that the Eighth Amendment was a constitutional bar to the execution of insane prisoners, the court turned to "whether the [court] was under an obligation to hold an evidentiary hearing on the question of Ford's sanity."[53] The plurality held,

> The adequacy of a state-court procedure ... is largely a function of the circumstances and the interests at stake. In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties;

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[51] *Id.* at 405, 106 S. Ct. 2595 (emphasis added) ("The adequacy of the procedures chosen by a State to determine sanity ... will depend upon an issue that this Court has never addressed: whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner.").

[52] *See id.* at 410, 106 S. Ct. 2595 (plurality opinion) ("Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed adequate in ages past.").

[53] The *Ford* Court asked whether the "District Court" was required to hold an evidentiary hearing. *Id.* (plurality opinion). Guided by AEDPA, we look to the state court's failure to hold such a hearing.

that death is different.

Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the *fact* or timing *of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.* Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution *calls for no less stringent standards than those demanded in any other aspect* of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that in the present state of the mental sciences is at best a hazardous guess however conscientious.[54]

Justice Powell, concurring in *Ford* in the narrowest opinion,[55] rejected the need for a full "sanity trial" but required procedural protections and a "fair hearing," holding that

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[54] *Id.* at 411-12, 106 S. Ct. 2595 (plurality opinion) (quotations and citations omitted, emphasis added).

[55] *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 2856, 168 L. Ed. 2d 662 (2007) ("Justice Powell's concurrence, which also addressed the question of procedure, offered a more limited holding. When there is no majority opinion, the narrower holding controls. Under this rule Justice Powell's opinion constitutes 'clearly established' law for purposes of § 2254 and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim." (citations omitted)).

> At least in the context of competency determinations prior to execution, the [due process] standard is no different from the protection afforded by procedural due process. It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless or until he recovers his sanity cannot be deprived without a "fair hearing." Indeed, fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.[56]

I am persuaded that the state court acted contrary to this clearly-established Supreme Court precedent. Like Ford, Hall challenged the adequacy of the process afforded to determine the crucial fact underlying a substantive constitutional right, the right against cruel and unusual punishment. Just as the state and district courts denied *Ford* an evidentiary hearing when he requested one, both the state court and the district court denied Hall a meaningful hearing. Neither Ford nor Hall received a determination of insanity or mental retardation at trial-in Ford, this was denied because insanity is a pre-trial question, or a post-trial question for condemned prisoners; here, because mental retardation at the time of his trial was solely a mitigating factor and yet to be defined by the constitutional strictures of *Atkins*. Both Ford and Hall were denied the minimal due process afforded for the determination of a substantive constitutional right, process with a "high regard for truth that befits a decision affecting the life or death of a

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[56] *Ford*, 477 U.S. at 424, 106 S. Ct. 2595 (Powell, J., concurring).

human being."[57] Instead, they were afforded only a minimal process void of any guarantees afforded by an adversarial hearing, such as confronting and cross examining witnesses to question their credibility. Ford lacked even the guarantees of the judicial system and received only a "cursory form of procedural review" in an executive forum. Hall had the benefit of a judicial system but received the same administrative-style review.

Cases defining due process, while not treating eligibility, bear on the clarity of Supreme Court precedent. Sentencing decisions on the elements of an offense and aggravating factors of course affect whether a death sentence is "appropriate," but they do not reach the determinative question of whether the defendant is eligible for the death penalty. While sentencing decisions with respect to the underlying offense and accompanying factors involve a range of gradation and substantial discretion, the question of eligibility as determined by mental retardation or insanity is not a sentencing "factor." As the Court determined in *Atkins* and *Ford*, the determination of eligibility is itself a substantive, constitutional guarantee governed by higher standards. The *Ford* Court alluded to this distinction between elements of death penalty offenses and sentencing factors on the one hand, and the determination of death eligibility based on a defendant's mental abilities on the other, holding that heightened constitutional protections apply to the determination of insanity where the "ultimate decision will turn on the finding of *a single*

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[57] *Id.* at 411, 106 S. Ct. 2595 (plurality opinion).

fact, not on a range of equitable considerations."[58]

In *Enmund v. Florida*, the Court held that under the Eighth Amendment, a defendant could not be sentenced to death for aiding and abetting a felony murder if there was no determination that the defendant himself killed or attempted to kill the victim.[59] The circuits differed over the constitutionally secured process for making this determination. The Fifth Circuit held that the guilt-innocence or sentencing phase of the trial must establish whether a defendant participated in murder or attempted murder, and the Eleventh Circuit held that a judge could make the finding.[60] The Court in *Cabana v. Bullock* resolved the split, agreeing with the Eleventh Circuit and holding that "the Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment .... The Eighth Amendment is not violated ... regardless of who makes the determination of the requisite culpability."[61] *Cabana* addressed only whether a jury trial was necessary for a finding of an element of a death-eligible offense and did not address the level of factfinding necessary for due process, holding,

> [T]he question whether the defendant killed, attempted to kill, or intended to kill *might in a*

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[58] *Id.* at 412, 106 S. Ct. 2595 (plurality opinion) (emphasis added).

[59] 458 U.S. 782, 798, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[60] *Cabana v. Bullock*, 474 U.S. 376, 382, 382 n.1, 106 S. Ct. 689, 88 L. Ed. 2d 704. (1986).

[61] *Id.* at 386, 106 S. Ct. 689.

> *given case turn on credibility determinations that could not be accurately made by an appellate court* on the basis of a paper record .... We shall not now attempt to determine what factfinding procedures would be adequate in the particular case before us, for, as we shall see, the state courts have not yet purported to engage in the requisite factfinding, and we decline to decide the hypothetical question of the adequacy of that which has not yet occurred.[62]
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> ...
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> The State argues that the Mississippi Supreme Court itself made a finding sufficient to satisfy *Enmund in the course of its direct review of [defendant's] conviction and sentence. ... We are very doubtful, however, that these assessments of the record were sufficient in themselves to constitute a finding* that Bullock killed, attempted to kill, or intended to kill Dickson. The Mississippi Supreme Court obviously was not addressing the specific requirements set forth in *Enmund*, for that case had not yet been decided.[63]

Cabana's core holding that an element of a death-eligible offense may be determined by a judge has since been eroded. *Walton v. Arizona* relied on *Cabana* and similar cases in holding that a jury need not determine the "aggravating circumstances

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[62] *Id.* at 388 n.5, 106 S. Ct. 689 (internal citations omitted).
[63] *Id.* at 389, 106 S. Ct. 689.

'elements' of ... [a death-eligible] offense."[64] The Court in *Ring v. Arizona* compared *Walton's* holding to *Apprendi v. New Jersey*, which held that a sentencing judge's determination that a crime had been committed because of racial animus-a determination that triggered the application of the Hate Crimes Statute-violated the requirement that "a jury determin[e] that [defendant] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[65] *Ring* found the two cases irreconcilable and "overrule[d] *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[66] The primary distinction between *Cabana* and *Walton* was that *Cabana* permitted a judge to determine a requisite element of a capital offense, whereas *Walton* found the same for the determination of an aggravating circumstance leading to a capital offense determination. Little remains of *Cabana* after *Ring*.

In *Williams v. New York*, the Court upheld judicial discretion to impose a death sentence where a jury found first-degree murder but recommended a life sentence.[67] The Court denied the invitation to "draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed."[68] Much has changed since 1949. The Court

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[64] 497 U.S. 639, 649, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).
[65] 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quotation omitted).
[66] 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).
[67] 337 U.S. 241, 243-44, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).
[68] *Id.* at 251, 69 S. Ct. 1079.

in *Woodson v. North Carolina*, striking down North Carolina's mandatory death penalty statute, held,

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[69]

The court also held,

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death.[70]

Regardless of what remains of *Cabana*, *Walton*, and *Williams* after Ring's holding, *Apprendi*, *Woodson*, *Cabana*, and *Walton* all addressed the question of whether a jury must determine a necessary element or aggravating circumstance of a capital offense, a question that I do not here ask or answer.

This brings me to other cases that do not speak to

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[69] 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).
[70] *Id.* at 304, 96 S. Ct. 2978.

the due process afforded a determination of mental retardation or insanity but set heightened due process requirements for similar determinations. In *Specht v. Patterson* the Supreme Court held that a defendant who was convicted under the Sex Offenders Act but not sentenced under the Act could not be sentenced without a hearing or the "right of confrontation and so on."[71] That Act allowed a district court to order punishment for "one day to life," including life imprisonment, if the defendant had been convicted of a sex offense, if the court received a written report arising from a full psychiatric examination of the patient, and if the court determined that the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill."[72] The court that sentenced Specht did not afford him a hearing, and the Court held that this violated due process, stating,

> [The Act] makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a *new finding of fact* that was not an ingredient of the offense charged.[73]

Similarly, *Atkins* came after Hall's trial, and

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[71] 386 U.S. 605, 608, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967).

[72] *Id.* at 607, 87 S. Ct. 1209 (quoting Colo. Rev. Stat. Ann. §§ 39-19-1 to 2 (1963)).

[73] *Id.* at 608, 87 S. Ct. 1209 (citations omitted).

demanded a new finding of fact. Of course, *Almendarez-Torres v. United States*[74] and *McMillan v. Pennsylvania*[75] have, since Specht, held that certain sentencing factors are not to be treated as elements of an offense and thus do not require a jury determination; and that "a sentencing factor that comes into play only after the defendant has been found guilty ... of [a] crime [ ] beyond a reasonable doubt"[76] does not prevent a state court from "pursuing its chosen course in the area of defining crimes and prescribing penalties."[77] But those cases both recognized that the "defendant in *Specht* was 'confronted with a radically different situation from the usual sentencing proceeding.' "[78] In *McMillan*, for example, a judge could increase a defendant's sentence if the judge found visible possession of a firearm. The Court held, "The finding of visible possession of a firearm of course 'ups the ante' for a defendant ... but it does so only in the way that we have previously mentioned, by raising the minimum sentence that may be imposed by the trial court."[79] Similarly, in *Almendarez-Torres*, where a penalty provision authorized an enhanced sentence for a recidivist, the sentence was "up to, but no more than, 20 years."[80] Neither of these cases rise to the level of life imprisonment, as in *Specht*, or to the potential

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[74] 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).
[75] 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).
[76] *Id.* at 86, 106 S. Ct. 2411.
[77] *Id.*
[78] *Almendarez-Torres*, 523 U.S. at 241-42, 118 S. Ct. 1219 (quoting *McMillan*, 477 U.S. at 89, 106 S. Ct. 2411).
[79] 477 U.S. at 89, 106 S. Ct. 2411.
[80] 523 U.S. at 226, 118 S. Ct. 1219.

for a life sentence. Nor do they undermine *Specht's* holding, as they expressly distinguish their facts as "radically different" from *Specht's*.

Other Supreme Court cases, like *Specht*, require an evidentiary hearing or similarly strict due process safeguards for findings far less weighty than mental retardation. *Kennedy v. Mendoza-Martinez* requires a full trial to "strip an American of his citizenship."[81] *Mendoza-Martinez* was convicted of draft evasion prior to the deportation proceedings that deprived him of citizenship.[82] This did not change the Court's due process conclusions. Mendoza-Martinez was "never tried for any crime the elements of which are identical with or totally inclusory of those" that led to his loss of citizenship,[83] just as Hall never had the chance to address the question of mental retardation-the very question determining his life or death-in a live hearing. In *Oyler v. Boles*, the Court held that "[e]ven though an habitual criminal charge [under a recidivist sentencing statute] *does not state a separate offense*, the determination of whether one is an habitual criminal is 'essentially independent' of the determination of guilt on the underlying substantive offense."[84] Thus, "a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge."[85] As in *Oyler*, the determination of mental retardation in Hall is not a separate offense; it is a separate fact, and it

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[81] 372 U.S. 144, 166, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).
[82] *Id.* at 167 n. 21, 83 S. Ct. 554.
[83] *Id.*
[84] 368 U.S. 448, 452, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962).
[85] *Id.* (emphasis added).

determines whether or not *Hall* is a certain type of criminal-in Hall's case, a death-eligible criminal.

When *Atkins* prohibited the execution of mentally retarded defendants, it did not add an element to a death-eligible offense or change a sentencing factor that could increase a defendant's punishment from imprisonment to death. It established a core and freestanding constitutional principle, that determined whether a defendant would face life or death. A determination of mental retardation under *Atkins* implicates the due process principles established by *Ford*. " 'If there is one "fundamental requisite" of due process, it is that an individual is entitled to an "opportunity to be heard".'"[86] The question before that Court was whether a lower court-in that case the district court-"was under an obligation to hold an evidentiary hearing on the question"[87] that determined Ford's life or death, and it concluded that it was. I find no dearth of clarity in these basic principles of due process.

III

In applying the Supreme Court's due process precedent in Ford and subsequent cases to the process here, it bears explaining that the CCA was not itself willing to decide the factual question of retardation on the trial record alone-that is, it

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[86] 477 U.S. at 424, 106 S. Ct. 2595 (Powell, J., concurring) (quoting O'Connor, J., concurring in the result in part and dissenting in part).

[87] *Id.* at 410, 106 S. Ct. 2595 (plurality opinion).

conceded that it needed the written, and, I note, untested, statements "supplementing" the trial record.

Just as we must give deference to a lower court when it has appropriately addressed a habeas issue, the Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction" in sentencing.[88] Under *Briseno*,[89] decided after the CCA concluded that Hall was not retarded, Texas elected to follow the American Association on Mental Retardation definition, which requires: "(1) significantly subaverage general intellectual functioning ['defined as an IQ of about 70 or below'[90]]; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18."[91] The process for determination of these three elements must of course meet constitutional standards. Evidence of mental retardation presented outside this framework as a mitigating factor of a capital sentence at trial, viewed retrospectively without a hearing, was contrary to the minimum due process required by federal law to determine Hall's mental capacity under *Atkins*, as Texas has defined it.

It bears accenting that Hall's claim was decided on

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[88] *Atkins*, 536 U.S. at 317, 122 S. Ct. 2242.

[89] *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).

[90] *Id.* at 7 n.24.

[91] *Id.* at 7 (internal quotations and citations omitted).

the fly,[92] and was decided before *Briseno* and subsequent cases that consistently allowed defendants to present live *Atkins* evidence at various stages of trial. The difference in process deployed in *Hall* as compared to *Briseno* and later *Atkins* cases says a great deal: Texas courts quickly found their footing post-*Atkins*, proceeding in a strikingly different way than they had with Hall's claim of retardation. Briseno was also convicted before *Atkins* but, unlike Hall, received a five-day evidentiary hearing on his post-*Atkins* habeas claim of mental retardation.[93] Similarly, in *Morris*, we remanded a defendant's federal habeas claim to the district court for an evidentiary hearing to address his *Atkins* claim.[94] In *Briseno*, when Texas set forth the *Atkins* test, the CCA's language implied that an oral evidentiary hearing was necessary for a determination of mental retardation, finding that factors "which factfinders *in the criminal trial context* might ... focus upon in weighing evidence as indicative of mental retardation" included evidence such as whether the defendant responds "coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject" and whether "those who knew the person best during the developmental stage-his family, friends, teachers, employers, authorities-think he was mentally retarded at that time, and, if so, act in

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[92] The Supreme Court had not ruled on Hall's direct appeal when the parties submitted their habeas affidavits on mental retardation in the state trial court.

[93] *Briseno*, 135 S.W.3d at 4.

[94] *Morris v. Dretke*, 413 F.3d 484, 499 (5th Cir. 2005).

accordance with that determination."[95] Although these evidentiary standards could be ascertained to a limited degree on paper, the factfinder's burden of making the final determination "based upon all of the evidence and determinations of credibility"[96] cannot be met by a judge's credibility assessment of conflicting affidavits. And in the *Atkins* case itself, the Virginia court on remand, considering "what type of proceeding is necessary and consistent with the Supreme Court's opinion"[97] and the fact that "the question of Atkins' mental retardation has never been answered,"[98] determined that the case should be sent to the county court "for a *hearing* on the sole issue of whether Atkins is mentally retarded"[99] as defined by the Virginia Code. Further, the court explicitly found that in a trial where the jury was "required to consider evidence of mental retardation in mitigation of capital murder but ... not required to make a definitive determination whether [defendant] suffers from mental retardation," the issue of mental retardation has not been fully addressed.[100]

Atkins both clarified the definition of mental retardation and moved it from a mitigating circumstance to a complete bar to execution after a hearing. And while that may not require another hearing where "[t]he question whether [defendant] is

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[95] *Briseno*, 135 S.W.3d at 8 (emphasis added).

[96] *Id.* at 9.

[97] *Atkins v. Commonwealth*, 266 Va. 73, 79, 581 S.E.2d 514 (2003).

[98] *Id.*

[99] *Id.* (emphasis added).

[100] *Id.* at 77, 581 S.E.2d 514.

mentally retarded" was "highly contested" at trial,[101] suggesting both that the defendant had ample opportunity for confrontation and cross examination, it is not this case. Here, mental retardation was solely a mitigating factor at trial, and the trial did not afford adequate process for reaching mental retardation, a technical, three-part test in Texas. In Louisiana, the courts have recognized their inability to rely upon mental retardation evidence presented for mitigation as evidence of *Atkins* mental retardation, stating: " *Atkins* changed what would be considered relevant. Prior to the trial, mental retardation was merely a factor in mitigation. Post *Atkins*, mental retardation is a complete prohibition against imposition of the death penalty ...."[102]

The reality is that determining mental retardation in general and certainly under *Atkins* engages assessments of testifying witnesses as well as relevant records. As the CCA stated in *Briseno* when establishing the *Atkins* mental retardation standard for Texas:

> [A]lthough experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is *one for the finder of fact, based upon all of the evidence and determinations of*

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[101] *United States v. Webster*, 421 F.3d 308, 314 (5th Cir. 2005).
[102] *State v. Williams*, 831 So. 2d 835, 856-57 (La. 2002).

credibility.[103]

There is nothing new here. The Supreme Court has consistently held that evidentiary hearings are essential for determinations of credibility.[104] The Advisory Committee to the Standing Committee on Federal Rules has agreed, stating: "When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say that they may not be helpful."[105] Indeed, affidavits can be helpful, but the credibility of the writer of an affidavit can be fairly tested only in a hearing.

Reciting the rote that oral hearings test credibility is an anemic and inadequate statement of their force. It is the hearing in open court which offers the opportunity to expose the very core of the evidence, its accuracy, and its weight. Our faith in live hearings is a judgment made at least two centuries ago, reaffirmed for so long as to become a central part of this country's democratic tradition and of a

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[103] *Briseno*, 135 S.W.3d at 9 (emphasis added).

[104] *See*, e.g., *United States v. Nixon*, 881 F.2d 1305, 1310 (5th Cir. 1989) ("If the district court's factual findings rest upon credibility determinations after an evidentiary hearing, this court will not substitute its reading of the evidence for that of the district court."). *See also Richardson v. Wright*, 405 U.S. 208, 219, 92 S. Ct. 788, 31 L. Ed. 2d 151 (1972) (Brennan, J., dissenting) (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)) (the right to cross examination rests largely on "credibility and veracity," i.e., where "facts are at issue").

[105] Advisory Committee note to Rule 7, Rules Governing Habeas Corpus Cases (quoting *Raines v. United States*, 423 F.2d 526, 530 (4th Cir. 1970)).

piece with its sense of fairness, and its defining of the relationship of citizen and state. The examples are many. I pause only to remind of a few. The Supreme Court's extensive examination of the role of magistrate judges in holding fact-finding hearings, which the trial judge then accepts on paper, demonstrates well the limits of the paper record. In holding that a magistrate under the Federal Magistrate Act cannot preside over jury voir dire, and reserving that function for a trial judge, the Supreme Court in *Gomez* spoke to the importance of the judicial function and the trial judge's responsibility, which rises far above simple document review:

> Like motions to suppress evidence, petitions for writs of habeas corpus, and other dispositive matters entailing evidentiary hearings, jury selection requires the adjudicator to observe witnesses, make credibility determinations, and weigh contradictory evidence. Clearly it is more difficult to review the correctness of a magistrate's decisions on these matters than on pretrial matters, such as discovery motions, *decided solely by reference to documents.*[106]

As the *Gomez* Court further explained, the nature of voir dire requires the court to "scrutinize not only spoken words but also gestures and attitudes of all participants ... But only words can be preserved for

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[106] *Gomez v. United States*, 490 U.S. 858, 874 n.27, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (emphasis added, internal citation omitted).

review; *no transcript can recapture the atmosphere of the voir dire*, which may persist throughout the trial."[107] *Peretz's* holding after *Gomez*-allowing a magistrate to preside over voir dire when the defendant waives his right to voir dire in the trial court-does not diminish *Gomez's* findings. When the Court upheld this waiver for felony trials, it emphasized that "the duties that a magistrate may perform over the parties' objections are *generally subsidiary matters* not comparable to supervision of jury selection. However, with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials."[108] The Court in *Raddatz*, in examining the ability of the magistrate to conduct a hearing on suppression of evidence, discussed this country's deep-rooted belief in the value of live trials:

> More than 100 years ago, Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading the notes of the witnesses' prior testimony: "The most careful note must often fail to convey the evidence fully in some of its most important elements .... It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; ... the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the

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[107] *Id.* at 874-75, 109 S. Ct. 2237 (emphasis added).

[108] *Peretz v. United States*, 501 U.S. 923, 933, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) (emphasis added).

ear and eye of those who receive it."[109]

And as English scholars have aptly commented, "an artful or careless scribe may make a witness speak what he never meant, by dressing up the depositions in his own form at language; but the witness is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken."[110] There are markers of the need for live hearings along the way of this country's entire history. In discussing the importance of jury voir dire and deference to a trial court's findings on challenges to members of a venire during voir dire, the Supreme Court one hundred twenty-eight years ago highlighted the types of findings that cannot be simply drawn from written evidence:

> The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes

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[109] *United States v. Raddatz*, 447 U.S. 667, 679, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) (quoting *Queen v. Bertrand*, 4 Moo. P.C.N.S. 460, 481, 16 Eng. Rep. 391, 399 (1867)).

[110] Henry John Stephen and James Stephen, *New Commentaries on the Laws of England* (partly founded on Blackstone) (1863).

> more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record.[111]

More recently, the Court has focused on the importance of deference to the findings of a trial judge, since the parties at trial are "forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one," and "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said."[112] Justice Powell in *Ford* discussed how the "competency determination depends substantially on expert analysis in a discipline fraught with subtleties and nuances."[113] And although Justice Powell's opinion did not conclude that this determination required a full trial, just as I do not maintain that a formal trial would be necessary for an *Atkins* determination, he recognized the basic need for the parties to introduce arguments before an impartial decisionmaker.[114]

Courts' emphasis, both historical and modern, on the need for a trial judge or an impartial decisionmaker to hear the most important issues in a case speaks

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[111] *Reynolds v. United States*, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1878).

[112] *Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

[113] *Ford*, 477 U.S. at 426, 106 S. Ct. 2595 (Powell, J., concurring) (quoting *Addington v. Texas*, 441 U.S. 418, 430, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)).

[114] *Id.* (Powell, J., concurring).

directly to the necessity of a hearing to determine mental retardation under Atkins, a hearing that tolerates confrontation and cross examination. Without such a hearing, the judge lacks the most essential aspects of a mental retardation determination-observation of the witnesses, with the credibility of experts' motivations and the confidence of the affiants exposed to cross examination in an open courtroom.

IV

Blind deference to the state's decision in this case would deprive Hall of his most basic due process rights. The trial court's examination of the mental retardation claim as one potential mitigating factor to a capital sentence, before *Atkins* was decided, tells us little about the evidence that is relevant to an *Atkins* claim. Nor do the criminal and district courts' re-examinations of the mental retardation evidence presented for mitigation, as well as post-conviction affidavits which presented new and important evidence of mental retardation, serve as "hearings" on the *Atkins* claim to which we must apply a presumption of correctness and give deference. There is a backdrop to this deficient hearing that cannot be ignored and that is the state trial courts' consistent and complete adoption of all of the State's findings throughout this process;[115] this creates a black hole

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[115] This practice is by no means uncommon and is, in fact, the overwhelming norm. *See, e.g.*, Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* at 125 (observing that "the 'paper hearing' is especially questionable when combined with the pervasive practice, followed by the

of deference and assumption that is not defensible. Both courts attempted to weigh the mitigation evidence themselves, guessing as to the credibility, reliability, and accuracy of the purveyors of that evidence and the *Atkins* affidavits, and finally deciding who to believe by reading works not necessarily and likely not crafted by the "witness."[116] But in doing so, they demonstrated the very flaws that render its paper determination of mental retardation, made without a hearing, an inadequate purveyor of due process.

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vast majority of Texas trial courts reviewing capital cases in state habeas proceedings, of resolving the disputes facts by adopting the prosecutor's legal arguments and characterizations of the evidence wholesale"). The authors reviewed "over one hundred post-1995 state habeas proceedings" and found "that the trial court's findings were identical or virtually identical to those submitted by the prosecutor in 83.7% of the cases examined." *Id.* at 127. For capital cases, the authors are not aware of *any* case where "a Texas trial court has ever adopted the findings proposed by the defendant seeking a new trial." *Id.* at 126 n.30.

[116] The affidavits are repetitive and phrased similarly (stating, for example, "Michael Hall is just a normal inmate to me," "Michael Hall acts is as normal as anyone in his pod," "Michael Hall's behavior is normal and does [sic] what he is supposed to do"), suggesting that one individual asked guards identical questions, wrote down their responses, and then requested the guards to verify the accuracy of the written responses. The end of each prison guard affidavit reads: "I have read each fo the [applicable number of] sections of this document and I find it to be a true and correct account of what I have told Investigator David Whisenhunt of the Tarrant County District Attorney's Office ...". This method of affidavit preparation is of course acceptable, but it suggests the deficiency of a court's relying solely upon affidavits and barring cross examination based on the affidavits.

The only mental retardation evidence heard live in this case is the limited testimony and cross examination on mitigation from Hall's trial, which occurred before the Supreme Court's *Atkins* decision. Many of the affiants have only been "heard" on paper–including two new experts (Dr. Church and Dr. Denkowski) who have never been cross examined. And *none* of the witnesses, expert or lay, have been cross examined on the issue of mental retardation as defined by *Atkins*. The CCA relied wholly on the paper evidence from this trial court record and additional affidavits submitted by both parties in rejecting Hall's *Atkins* claims. In the initial hearing, Hall and the state addressed mental retardation as a potential mitigating factor in Hall's death sentence and not in light of the three specific *Briseno* factors that define *Atkins* mental retardation in Texas. Much of the testimony focused on Hall's family life, emotional abuse, and the question of Hall's understanding of culpability and the "wrongness" of his acts, rather than on whether or not he was in fact mentally retarded according to *Briseno's* "scientific" definition of that term. The question to which all of this evidence was directed did not even mention the word "mental retardation." Rather, the question on mitigation (Special Issue Number 3) asked:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, there is a sufficient mitigating

> circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

The testimony and cross examination addressing Hall's IQ showed that the issue was controversial and muddled,[117] and the state's only expert discussed Hall's adaptive *knowledge*, not functioning. The closing arguments from the trial record most strongly illuminate the dearth of sufficient *Atkins* evidence in the trial court's paper hearing, as shown by the state's sweeping assertion that mental retardation was only for "labeling purposes" and had little relevance to the question of mitigation.

Ironically, the CCA, in finding that Hall was not mentally retarded for a second time and relying upon the paper trial record and habeas affidavits, stated: "At no point did appellant [during trial] request that the trial judge or the jury make a specific fact-finding as to whether appellant was in fact mentally retarded."[118] Had Hall and his attorneys possessed extrasensory abilities-and had they known that Hall's initial trial would be their only opportunity to present live evidence of the very issue of *Atkins* mental retardation that would determine Hall's fate-they would have of course seized the opportunity to present their proof of mental retardation in open court and not by mail. The state, in turn, would have offered rebuttal evidence and cross examined

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[117] The experts addressed the confusion over the IQ tests' standard error but did not resolve or fully clarify the issue.

[118] *Hall v. Texas*, 160 S.W.3d 24, 26 (Tex. Crim. App. 2004).

defendants' witnesses and experts on their credibility as it specifically related to the three *Briseno* factors of mental retardation in Texas. But neither side did so, because neither could have known that the Court would declare a new constitutional standard in *Atkins*. Further, neither side could have predicted that the state and district courts would have refused the parties an opportunity to confront and cross examine the expert witnesses who offered conflicting opinions. And the brief opportunity afforded to present *Atkins* evidence on paper failed to remedy the absence of genuine adversarial contest. Between Hall's state application for habeas, which claimed that it was unconstitutional to execute a mentally retarded defendant in light of the pending *Atkins* case, and the state's reply, the Supreme Court decided *Atkins*. Therefore, both the habeas application and the reply contained *Atkins*-type arguments, and both Hall and the state relied upon the Texas Legislature's and Health Code's definition of mental retardation, which is similar but not identical to the AAMR test for mental retardation under *Atkins* that the *Briseno* court later adopted. The TLHC definition of a mental retardation is "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior ... Further, this condition must have originated during the developmental period." *Briseno's* AAMR test requires "limitations" in adaptive functioning that are "related" to the subaverage intellectual functioning, with onset before age 18. Although the trial court's paper habeas hearing, which occurred just after *Atkins* was decided, ostensibly allowed the parties to "argue" the

issue of mental retardation under a definition similar to the *Briseno* standards, the arguments put forth on paper left gaps in the focus demanded by *Atkins*. At best, the experts reiterated prior arguments over IQ and failed to resolve them, bickering over standard error and citing incorrect IQ results. Two new experts presented affidavits and neither of these experts were ever cross examined as to their competency. They asserted their own views on the proper means for testing IQ and adaptive functioning, as well as the proper measurement of margins of errors and application of test results to the *Atkins* factors, yet they never debated these views live. Significantly, Dr. Denkowski pointed out potentially major flaws in some of the analyses relied upon by Dr. Price and others (that the TONI test, for example, does not even technically measure IQ), yet most of these flaws have not been tested in a courtroom. And the lay affiants presented broad claims that would have likely been pierced, or substantially altered in strength, upon cross examination. The judges in each step of Hall's case and collateral review decided they could sort through the complicated scientific evidence and conflicting lay opinions themselves, without the aid of adversarial truthseeking. This occurred despite the failure of the trial record or the supplemental affidavits to sufficiently address any of the *Briseno* factors. Regarding the question of onset before the age of 18, the state's only argument directly addressing this issue covered less than one page of its reply to Hall's habeas application and relied upon the controversial school IQ scores of 71 on the WISC-R and 84 on the TONI, the faults of which Dr.

Cunningham had raised in trial and Dr. Denkowski further explored on paper.[119] In alleging that Hall did not have significant limitations in adaptive functioning, the state relied wholly on descriptions of Hall's participation in the murder (alleging that this demonstrated his ability to function competently), the testimony of his family from the trial testimony, lay affidavits from prison guards, and on Dr. Price's description of the Street Survival Skills Questionnaire that he administered on Hall-a test for adaptive *knowledge*, not functioning. We expect a reasonable level of detail in determining whether a defendant meets the *Briseno* factors. As the Court in *Atkins* explained, "To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded."[120] This type of controversial determination requires a careful and reasoned investigation of relevant facts, and the general allegations of parties on paper fail to come close to the level of relevance required for an *Atkins* determination.

In mental retardation cases, the CCA has specifically found that when a trial court determines an *Atkins* claim, "the trial court must not rely so extensively upon ... expert testimony as to commit the ultimate

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[119] The state's attorney also suggested in trial that the multiple head injuries suffered by Hall as a child were insignificant, as demonstrated by his mother's failure to take him to the hospital for some of the incidents.

[120] *Atkins*, 536 U.S. at 317, 122 S. Ct. 2242.

decision of mental retardation to the experts."[121] The state's post-*Atkins* argument that Hall is not retarded rests in part on the affidavits of prison guards. These witnesses, given the nature of their job and its accompanying dangers, may not be inclined to volunteer evidence of mental retardation to state prosecutors. Additionally, as the dissent to the opinion of the CCA observes, the guards demonstrated only vague and largely irrelevant understandings of mental retardation[122] while simultaneously asserting that Hall appeared normal. The Supreme Court has found-in *civil* cases-that an individual's knowledge of the nature of the Government's argument, protected by "the requirements of confrontation and cross-examination," is "*important* in the case of documentary evidence," but "even *more important* where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be ... persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy."[123] While the right to cross examination rests largely on questions of "credibility and veracity," "[a]n individual has those rights because facts are in

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[121] *Briseno*, 135 S.W.3d at 13 n.30 (citing *Williams*, 831 So.2d at 859).

[122] One prison guard "knew some kids in school with Down's syndrome," while another had one uncle who was mentally retarded. Some of the guards only observed Hall sporadically, when they happened to be assigned to his prison unit.

[123] *Richardson*, 405 U.S. at 218, 92 S. Ct. 788 (Brennan, J., dissenting) (quoting *Goldberg*, 397 U.S. 254, 270, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)).

issue."[124] And we know little about how the other lay witnesses actually "understood" mental retardation, or whether they observed Hall for a sufficiently long period of time to accurately observe his mental capacity. Many statements in affidavits from both the state and the defense indicate precisely how these issues begged for oral hearing. The affidavit of a waitress who served him once, for example, would not likely carry much weight in an *Atkins* hearing. Prison guards repeatedly made broad, sweeping allegations, such as "Michael Hall is just a normal inmate to me," "I have never heard Michael Hall referred to as 'Half Deck' by anyone," and "I had the usual contacts and conversations with Hall and observed nothing unusual," while teachers claimed that Michael "demonstrated behaviors similar to those of a child with a diagnosis of Mental Retardation" and his trial counsel indicated that "Michael tried to mask his retardation ... he bitterly did not want people to think him 'dumb' ...."

As Hall argued in his habeas application:

> For any fact-finder to make a determination as to whether Applicant is mentally retarded, it will be necessary to hear the testimony [of] people such as teachers, counselors, and mental health providers who had contact with Applicant before and after his incarceration concerning Applicant's adaptive functioning. Additionally ... the fact-finder will be required to weigh the testimony of witnesses from both sides-psychologists who had interviewed

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[124] *Id.* at 219, 92 S. Ct. 788.

> Applicant ... The fact-finder will also have to hear from experts in the field of mental retardation so that the fact-finder [will] be able to gain an understanding of exactly what mental retardation is, and the variety of ways that it is manifested in those afflicted with it. It will be impossible for any fact-finder to make an informed and intelligent decision about which experts are most qualified and most credible in making their respective conclusion without hearing from the experts in court and subjecting them to the rigors of a Daubert/Rule 702 hearing and cross-examination.

A judge presiding in court at an oral hearing has "the superior opportunity of an observer of witnesses to comprehend their testimony,"[125] an advantage in "essaying the truth of a matter when the facts are caught up with a witness's manner of expression."[126] Our principles of deference to trial courts are clear, and we follow these principles because of the trust that we place on the trial process to do justice to the evidence placed before it.

Returning to basics, an oral hearing with cross examination of experts allows the trier to evaluate not only the raw contents of that evidence but the way in which the evidence plays out as presented live: the inconsistencies that arise, the phrases that went unnoticed yet carry great weight, and the responses to cross examination that may bring out

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[125] *O'Bryan v. Estelle*, 714 F.2d 365, 392 (1983) (Higginbotham, J., concurring).

[126] *Id.* at 393 (Higginbotham, J., concurring).

weaknesses in an assertion that appears bullet proof on paper. It is sometimes the silences in the courtroom that confess a realization of truth but are not preserved for reading by judges at another place and another time. Hearings in open court, or "little" trials, are not perfect but they are the best that we do in a system that remains as fair as any in the world. And they must not be jettisoned in the elusive and illusive pursuit of "efficiency." Of course efficiency is an important component of a fair system, at least as much as the system can stand. The reality is that far less time would have been taken by a hearing than the time consumed in the struggle over its absence. Submissions on paper are the staple of the administrative state. I do not gainsay the role of our administrative state in saying that whether a man lives or dies at the hand of his government for his conduct is not to be decided by administrative agencies. Nor, I say, with all respect, by courts who unwittingly ape them by accepting the adequacy of administrative manners not prescribed for courts of law but as an alternative to them.

Here, judges distant from any live testimony or cross examination attempted to decipher the evidence for themselves, despite differing accounts of the accuracy of IQ tests and standard error, despite conflicting lay opinions on Hall's mental abilities, and, most importantly, despite the state expert's admission that the determination of mental retardation is a "judgment call" in this case and can "literally turn on a word or a number." When a constitutional issue turns on a word or number-particularly here, where the first prong of *Briseno's*

mental retardation test requires an IQ of 70 or below for a finding of mental retardation-a judge's analysis of paper arguments over the accuracy of IQ tests and complicated standard of error ranges cannot do justice to a defendant's right to a determination of mental retardation. I have little doubt that the state trial judge would have never relied upon the erroneous misstatement of Hall's IQ made in an affidavit of one of Hall's expert witnesses had there been a hearing in more than name. It is the risk of just such errors that underpins the assurances of the procedural protections of due process. That a state is free to allocate the adjudicatory responsibility to trial or appellate courts does not reduce the constitutionally secured minimum for deciding a substantial claim of retardation under *Atkins*, bristling with sharply contested facts.

I have not invoked the familiar and reminded of primer rules and common understandings that came with the founding and have clung to our national psyche, powerfully informing our present elaboration because they have not been learned, but because in the daily mix of affairs they are occasionally forgotten.

This panel has unanimously concluded that the state did not afford Hall's claim of retardation a full and fair hearing. It follows that we vacate the decision of the federal district court and remand for an evidentiary hearing. Here I would chart a different path. We should also make clear that because the finding that the state denied Hall a full and fair hearing on a claim of retardation is constitutionally

footed, the state's adjudication is constitutionally flawed and has resulted in a decision that was contrary to and an unreasonable application of federal law as determined by the Supreme Court. Refusing to allow confrontation and cross examination was an error of law, one that violated the federal law as established by the Supreme Court. We should vacate the decision of the district court with instructions to that court to enter an order that unless the state shall provide a constitutionally adequate evidentiary hearing on Hall's claim within 120 days of the issuing of the mandate, Hall shall not be eligible for death.[127] To do otherwise does not give Hall his due-a hearing that not only affords the opportunity to confront and cross examine the state witnesses but also a hearing free of the deference the federal district court must give to the state adjudication of retardation-and passes over the reality that the state adjudication here was

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[127] Indeed, Texas allows the Texas Court of Criminal Appeals to utilize the state trial courts for hearings requiring evidentiary presentations. *See* Tex. Code Crim. Proc. art. 11.071 § 8 ("If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection .... (f) The clerk of the convicting court shall immediately transmit to: (1) the court of criminal appeals a copy of: (A) the application; (B) the answers and motions filed; (C) the court reporter's transcript; ... (2)(C) findings of fact and conclusions of law entered by the court.").

constitutionally flawed.

Appendix D

United States District Court,
N.D. Texas,
Fort Worth Division.

Michael Wayne HALL, Petitioner,
v.
Nathaniel QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.

No. 4:06-CV-436-A.

Aug. 3, 2006.

MEMORANDUM OPINION and ORDER

MCBRYDE, District Judge.

Came on for consideration the petition for writ of habeas corpus ("petition")[1] filed by Michael Wayne Hall ("Hall"), an inmate in the Texas Department of Criminal Justice, Institutional Division, who is under sentence of death. The court has determined

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[1] While the undersigned recognizes that 28 U.S.C. § 2254 contemplates the filing of an "application" for writ of habeas corpus, the practice of the Northern District of Texas has long been instead to use the term "petition." Consistent with this now ingrained practice, the undersigned refers to Hall's's application under 28 U.S.C. § 2254 for writ of habeas corpus as the "petition" and uses the term "petitioner" in lieu of "applicant."

that the petition should be denied for the reasons set forth in this memorandum opinion and order.

I.
Procedural History

On February 23, 2000, in the 371st District Court of Tarrant County, Texas, Hall was convicted and sentenced to death for the murder of nineteen-year old Amy Robinson. On January 16, 2002, the Texas Court of Criminal Appeals affirmed his conviction and sentence. *See Hall v. State*, 67 S.W.3d 870 (Tex. Crim. App. 2002), *vacated*, 537 U.S. 802, 123 S. Ct. 70, 154 L. Ed. 2d 4 (2002). On October 7, 2002, the United States Supreme Court granted Hall's petition for writ of certiorari, reversed the judgment, and remanded the case for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), wherein the Supreme Court held that the execution of a mentally retarded criminal was a cruel and unusual punishment under the Eighth Amendment to the Constitution. *See Hall v. Texas*, 537 U.S. 802, 123 S. Ct. 70, 154 L. Ed. 2d 4 (2002).

While Hall's direct appeal was pending, on January 17, 2002, Hall also applied for habeas relief in the trial court. In response to *Atkins*, the trial court ordered an evidentiary hearing by affidavit to determine the issue of Hall's mental retardation. After receiving affidavits from Hall and the state, and also taking into account the evidence offered at trial as to Hall's mental capacity, the court concluded

that Hall did not clearly fall within the definition of mental retardation. Alternatively, relying on *Atkins*, the court held that even if Hall fell within the upper range of mild retardation, he did not fall within the range of offenders about whom there is a national consensus regarding the exemption from the death penalty. *See Atkins*, 536 U.S. at 317, 122 S. Ct. 2242.

On February 26, 2003, the Texas Court of Criminal Appeals too denied habeas relief. *See Ex Parte Hall*, No. 53,668-01 (Tex. Crim. App. Feb. 26, 2003).

Later, on May 5, 2005, on direct appeal, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions from the state-habeas proceedings on Hall's mental capacity. *See Hall v. State*, 160 S.W.3d 24, 38-39 (Tex. Crim. App. 2004). In an abundance of caution, however, the Court of Criminal Appeals also reviewed the evidence, both from the direct appeal and the state-habeas proceedings, and independently found that the trial court's conclusion that Hall is not mentally retarded to be supported by the record. *Id.* at 40. On June 27, 2005, the Supreme Court denied Hall's petition for certiorari. *See Hall v. Texas*, --- U.S. — , 125 S. Ct. 2962, 162 L. Ed. 2d 891 (2005). On June 20, 2006, Hall filed the instant petition for federal habeas corpus relief.

II.
Underlying Facts

The Court of Criminal Appeals well summarized the facts of the crime as follows:

Eighteen-year-old Hall and his friend Robert Neville decided to kill someone because Hall was angry that he had a "sucky-ass" life. They started searching for the right victim and preparing for their crime by obtaining rifles, pellet guns, a crossbow, and ammunition. After much looking, Hall and Neville finally chose nineteen-year-old Amy Robinson, a friend and former coworker, because she trusted them and they "didn't have to put bruises on her to get her in the car." The evidence also revealed that Amy had a genetic disorder that made her small and mentally and physically slow. She stood four feet five inches tall and had the mental capacity of a third or fourth grader.

On February 15, 1998, Hall and Neville went looking for Amy in order to carry out their murderous plan. They checked her schedule at the Kroger grocery store and then lay in wait for her to ride by on her bicycle on her way to work. When the pair saw Amy, they coaxed her into the car, promising to drop her at work after they circled around in the country. As Neville drove, Amy complained that she did not want to be late for work.

Neville then pretended to have a flat tire and pulled the car over on a dirt road by a remote field. Hall and

Neville got out of the car and walked into the field carrying their weapons while an unsuspecting Amy waited in the car listening to the radio. At some point, Hall persuaded Amy to get out of the car, telling her she needed to go talk to Neville near a tree. As Amy walked toward Neville, he fired a crossbow at her several times. Neville missed each shot, but Amy became angry when the last arrow grazed her hair. When Amy started walking back to the car, Hall shot her in the back of her leg with his pellet gun. Hall and Neville laughed while Amy cried in pain.

Meanwhile, Neville returned to the car and got his .22 caliber rifle. When Hall managed to maneuver Amy back into the field, Neville shot her in the chest. Hall then shot her in the chest "three or four or six times" with the pellet gun. Amy fell to the ground making loud noises and shaking. Hall then stood over her and stared for five to ten minutes. The pair worried that someone would hear Amy, so Neville shot her in the head, killing her instantly. Hall and Neville then left Amy and her bicycle in an area where they would not be easily discovered.

A few days later, they returned to the scene. Neville fired shots into Amy's dead body, and Hall took keys and money from her pocket. When Amy's family and coworkers realized she was missing, a massive search ensued. More than two weeks later, authorities focused on Hall and Neville. Fearing they would be caught, the pair fled Arlington but were soon arrested when they attempted to cross the

border into Mexico. The authorities found Amy's body on the day of the arrest.

Hall, 67 S.W.3d at 873.

At the sentencing phase of trial, the jurors heard additional evidence about the crime:

[O]nce Hall and Neville had made their plans and chosen their mentally challenged victim, they taunted and tormented her, reveling in her confusion and agony. Finally, Hall boasted in his media interview that he was the one who got Amy to trust him, and she would have escaped had Neville tried to commit the offense without him. Indeed, Hall told the media that he had no remorse for Amy's death. When asked how he felt about Amy dying the way she did, Hall snickered, "Well, I wouldn't want to be in her place. She had to take a lot of pain." After his arrest, Hall told law enforcement and the media that he and Neville had wanted to become serial killers and kill one to five people a week. They also wanted to become white supremacists and kill African Americans.

Hall, 67 S.W.3d at 874.

As far as mitigating circumstances to a death sentence, the jury heard considerable evidence from Hall as to his alleged mental retardation. The jurors, however, determined that the evidence did not warrant a life sentence.

III.
Scope of Review

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("the AEDPA"). Under the AEDPA, the ability of federal courts to grant habeas relief to state prisoners is narrowly circumscribed:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

AEDPA, § 104(3) (codified at 28 U.S.C. § 2254(d)).

The AEDPA further provides:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a

determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

AEDPA § 104(4) (codified at 28 U.S.C. § 2254(e)(1)).

Having reviewed the petition, the response, the record, and applicable authorities, the court finds that none of Hall's grounds has merit.

IV.
Grounds for Relief

Hall urges seven grounds in support of his petition. They are as follows:

Ground One: Hall is ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), because he is mentally retarded.

Ground Two: Because Hall was denied a jury determination of mental retardation, his death sentence should be set aside under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

Ground Three: The indictment under which Hall was charged was constitutionally inadequate, and the mitigation instructions were unconstitutional by failing properly to quantify the burden of proof on mitigation.

Ground Four: The use at trial of Hall's televised media interview violated his privilege against self-incrimination, his right to counsel, and due-process rights.

Ground Five: The Texas-death-penalty statute is unconstitutional.

Ground Six: The evidence regarding Hall's future dangerousness was legally insufficient.

Ground Seven: The mitigation instructions were unconstitutional, because, *inter alia*, they allowed the jurors to consider the aggravating aspects of otherwise mitigating evidence.

V.
Discussion

A. *Ground One*: Atkins

In *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), the Supreme Court banned the execution of the mentally retarded. However, "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317, 122 S. Ct. 2242. The obvious challenge-which the Supreme Court, in turn, left to the states to meet-is how to determine which offenders falls within the range of

mental retardation sufficient to render a sentence of death unconstitutionally cruel. *Id.*

Here, the State of Texas used a three-part definition borrowed from the American Association of Mental Retardation[2] and generally codified in Section 591.003 of the Texas Health and Safety Code. Specifically, under this definition, "a person is mentally retarded if he has three characteristics: (1) 'significantly subaverage general intellectual functioning' (an IQ of about 70 or below); (2) 'related limitations in adaptive [behavior],' and (3) onset of the above two characteristics before age eighteen."[3] *Hall*, 160 S.W.3d at 36 (citation omitted). Although the first and third elements are relatively self-explanatory, the second element is perhaps not. Adaptive behavior generally refers to "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility of the person's age and cultural group." *See* Tex. Health & Safety Code. Ann. § 591.003(1) (Vernon 2003). To state a successful claim under *Atkins*, all three prongs of the definition must be met. *See In Re Salazar*, 443 F.3d 430, 432 (5th

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[2] The Supreme Court cited to this definition in *Atkins*. *See Atkins*, 536 U.S. at 308 n. 3, 122 S. Ct. 2242. The State of Texas also uses this definition in death-penalty cases. *See Ex Parte Briseno*, 135 S.W.3d 1, 6-8 (Tex. Crim. App. 2004).

[3] Perhaps because Hall was eighteen-years old when the murder was committed, neither he nor the State devote much briefing, if any, to the element requiring that the mental retardation manifest itself by that age. As a result, the court does not either. If Hall were mentally retarded, it is a likely a given that he was so before he turned age eighteen.

Cir.2006). And it is Hall's burden, by a preponderance of the evidence, to show that each prong is met. *Hall*, 160 S.W.3d at 38.

In his petition, Hall thoroughly reviews the voluminous evidence as to his mental capacity. *See* Hall's Pet. for Writ of Habeas Corpus ("Hall's Pet.") at 1-33. The State does the same in its response. See Resp't's Resp. at 4-21. There is no reason for the court to do so again here. Briefly, however, in support of his claim of mental retardation, Hall offered the testimony of three psychologists, his mother, his brother, his trial attorneys, two private investigators, four teachers and a fellow death-row inmate. *See, e.g., Hall*, 160 S.W.3d at 40. The State controverted Hall's claim with the testimony of a psychologist, five prison guards, a waitress, Hall's former work supervisor, a former co-worker, and a police detective. *Id.* In addition, there was, *inter alia*, evidence submitted as to Hall's school records and his videotaped interview with the press following his arrest. *Id.* There were also, of course, the circumstances surrounding the crime itself.

The specific evidence was that Hall had an IQ of between 67 to 74. The evidence of adaptive behavior conflicted. On the one hand, Hall's witnesses claimed that Hall could not tell time from a traditional clock, had trouble following instructions, could not grasp money concepts, had limited social skills, and suffered from a life-long record of poor academic performance. On the other hand, the State put on evidence indicating that Hall was average in a

number of adaptive behaviors, including the use of tools, health and safety, and appliances. Further, according to Hall's own mother, Hall could read and write well enough to pass a written driver's test and had had at least one, if not two, age appropriate girlfriends. The State's psychologist also found that, during his interview with Hall, Hall acted and talked like an adolescent or young adult. Also, in talking about the murder of Amy Robinson, Hall was fluent, articulate, and related events logically.

Having independently reviewed all of the evidence, the court concludes that, while there is evidence indicative of mental retardation, arguably only of mild mental retardation, there is ample evidence that Hall is not mentally retarded. Consequently, the state court's finding that Hall is not mentally retarded was not unreasonable. *See* 28 U.S.C. § 2254(d)(2). Nor was the state court's alternative finding that, even if Hall were mildly retarded, he "is not so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *See Atkins*, 536 U.S. at 317, 122 S. Ct. 2242. Moreover, those findings are presumed to be correct unless controverted by Hall with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Hall has failed to meet that burden here.[4] The court

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[4] The court views the issue of Hall's mental capacity as one of fact. Even if viewed as a mixed issue of fact and law, the state-court decision on this issue was not contrary to or otherwise involved an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

thus concludes that Hall's sentence of death is constitutional. Hall's ground one is denied.

B. *Ground Two: No Jury Finding on Mental Retardation*

Relying on *Atkins* and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), Hall contends that he was entitled to a jury finding on the issue of mental retardation. *See* Hall's Pet. at 34-36. The holding of *Atkins* has already been discussed. In *Ring*, the Supreme Court held that, where a fact-finding increases the maximum punishment established by the legislature, a capital defendant is entitled to have that fact decided by the jury. *Ring*, 536 U.S. at 589, 122 S. Ct. 2428.

As correctly pointed out by the State, because Hall failed to raise this issue in the state proceedings, it is procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); 28 U.S.C. § 2254(b)(1). Consequently, federal habeas review of this claim is barred unless Hall demonstrates "cause for the default and actual prejudice as a result of the alleged violation of federal law" or that "failure to consider [this claim] will result in a fundamental miscarriage of justice." *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004), *cert. denied*, 543 U.S. 1134, 125 S. Ct. 1240, 160 L. Ed. 2d 1092 (2005), (citing *Coleman*, 501 U.S. at 750, 111 S. Ct. 2546). Here, Hall has made no attempt to show cause and prejudice for his default or that failure to consider this ground will result in a

fundamental miscarriage of justice. Consequently, the court is satisfied that ground two is procedurally defaulted.

Even if it not procedurally defaulted, Hall's claim that he was entitled to a jury determination on mental retardation is without substantive merit. Nowhere in *Atkins* does the Supreme Court hold that a jury determination on this issue is required. To the contrary, in *Atkins*, the Supreme Court expressly left to the states the task of developing appropriate ways to enforce the constitutional restriction on executing mentally retarded offenders. *See Atkins*, 536 U.S. at 317, 122 S. Ct. 2242; *see also Schriro v. Smith*, 546 U.S. 6, 126 S. Ct. 7, 163 L. Ed. 2d 6 (2005) (holding that the Ninth Circuit erred by commanding the Arizona courts to conduct a jury trial to resolve defendant's mental retardation claim). Moreover, the Fifth Circuit has specifically held that Ring does not require a jury determination on mental retardation. *In re Johnson*, 334 F.3d 403, 404-05 (5th Cir. 2003). This court is bound by that precedent. Ground two is also denied.

C. *Ground Three: The Mitigation Issue*

1. *Burden of Proof*

First, Hall argues that Texas's capital-sentencing scheme is unconstitutional, because it fails to quantify the burden of proof on the issue of mitigation and fails to specify which party bears that burden. *See* Hall's Pet. at 37-38. In making this argument, Hall again relies on *Ring*. In *Ring*, however, the Supreme Court was abundantly clear that only the issue of aggravating circumstances-not mitigating circumstances-was before it. *Ring*, 536 U.S. at 597 n.4, 122 S. Ct. 2428. Indeed, the Supreme Court specifically noted that it " 'has often recognized a distinction between facts in aggravation of punishment and facts in mitigation.' " *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490-91 n.16, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). In short, Hall has failed to point to any legal precedent in his favor on this issue. Consequently, the court rejects this assertion.

2. *The Indictment*

Hall's second argument concerning the mitigation issue and the indictment is unclear. *See* Hall's Pet. at 37-38. As best as the court can decipher, however, relying on *Apprendi*, 530 U.S. at 476, 120 S. Ct. 2348, Hall urges that, in violation of the Constitution, the State failed to plead the absence of mitigation in the indictment. As is evident, however, from the very language Hall relies on in making this

assertion, *Apprendi* only requires that "any fact ... that *increases* the maximum penalty for a crime must be charged in the indictment ..." *See Apprendi*, 530 U.S. at 476, 120 S. Ct. 2348 (emphasis added). This contention is thus also without merit. Ground three is denied.

D. *Ground Four: Admission of Hall's Videotaped Statement*

After Hall was arrested, he gave reporters an interview that was videotaped. Hall alleges that the admission of the videotaped interview at trial violated his privilege against self-incrimination, his right to counsel, and due process rights in contravention of the Fifth, Sixth, and Fourteenth Amendments. *See* Hall's Pet. at 39. Or, as well summarized by the State, the gist of Hall's complaint is that when the reporters interviewed him, they were acting as state agents, and the state court's finding to the contrary was incorrect. *See* Resp't's Resp. at 29.

If a state obtains an incriminating statement from an accused by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent, the Sixth Amendment is violated.[5] *See Maine v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). Here, there is no evidence that the

[5] For purposes of this analysis, this court, like the Texas Court of Criminal Appeals, has assumed that Hall had been formally charged at the time of the interview

reporters were acting as agents of the State. To the contrary, the reporters testified at the suppression hearing that no authority ever suggested that they conduct the interview, and no authority suggested any questions for them to ask. *Hall*, 67 S.W.3d at 875. In fact, the reporters did not even provide authorities with copies of the interview. *Id.* The court therefore concludes that the state court did not err in rejecting this claim. This court likewise concludes that it is without merit.[6]

E. *Ground Five: The Death-Penalty Statute Is Unconstitutional*

Hall raises a number of complaints within his ground for relief wherein he claims that the death-penalty statute in Texas is unconstitutional. *See* Hall's Pet. at 40-45. The court, however, concurs with the State that the only one raised in the state-court proceedings was whether the jury is given too much discretion by the special-issue system. Because none of the others were raised in the state-court proceedings, they are all procedurally defaulted.[7] *Coleman* 501 U.S. at 735 n.1, 111 S. Ct. 2546. And,

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[6] Hall claims that the interview was given without his consent, because he lacked the mental capacity to give consent. Because this assertion is purely derivative of his mental-retardation claim, the court rejects it.

[7] The procedurally-defaulted issues include, inter alia, that the state law judge failed to define "probability" for the jury and such failure gave the jury too much discretion in deciding the issue of future dangerousness. Also, the jury was not given guidance as to the meaning of "criminal acts of violence" and "continuing threat to society." *See* Hall's Pet. at 40-45.

yet again, Hall has failed to show cause and prejudice for his default or that failure to consider these other complaints will result in a fundamental miscarriage of justice. Consequently, federal habeas review of them is barred. *Bagwell*, 372 F.3d at 755.

With respect to whether Texas juries are given too much discretion, the Fifth Circuit has specifically held that the jury "may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *See Woods v. Cockrell*, 307 F.3d 353, 359 (5th Cir. 2002) (citations omitted). Also, the Supreme Court has held that Texas's capital-sentencing procedures are constitutional. *See Jurek v. Texas*, 428 U.S. 262, 269-277, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). Thus, the state court finding against Hall on this issue was not contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d)(1). Habeas relief is not warranted.

F. *Ground Six: Insufficient Evidence of Future Dangerousness*

Hall's argument that there was insufficient evidence of his future dangerousness is premised on his underlying assertion that *Ring* requires future dangerousness to be proven beyond a reasonable doubt. *See* Hall's Pet. at 45 (citing *Ring*, 536 U.S. at 602-03, 122 S. Ct. 2428). The court does not read *Ring* as authority for that proposition. Apparently neither does the State. In fact, the State urges that,

despite Texas law requiring future dangerousness to be proven beyond a reasonable doubt,[8] the Constitution does not so require as a matter of federal due process. See Resp't's Resp. at 35-37.

The court, however, need not resolve this debate. It is satisfied that, even under the stricter standard of burden of proof urged by Hall, the state-court jury's finding that Hall was a future danger was not unreasonable given the evidence in this case. *See* 28 U.S.C. § 2254(d)(2). Among other things, the evidence shows that Hall's murder of Amy Robinson was coldly premeditated. She was carefully chosen, because Hall thought she would be an easy first kill of what he hoped would be a series of future, weekly and racially-motivated killings. Also, Hall showed no remorse over her death. To the contrary, he boasted and snickered about it to the media. The evidence also showed that he had violent fantasies and dreams of hurting people, which is common for potential killers. Moreover, the finding of the state-court jury based on this evidence that Hall was a future danger to society is presumed to be correct unless controverted by Hall with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Hall has failed to do so. Ground six is denied.

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[8] Although the State does not directly admit that Texas law so holds, it does. *See* Tex. Code Crim. Proc. Ann. art. 37.0711(3)(c) (Vernon 2005).

G. *Ground Seven: The Mitigation Instructions Were in Error*

Hall launches various complaints regarding the mitigation instructions given to the jury. These include, *inter alia*, that they wrongly permitted the jury to consider mitigating evidence as aggravating evidence, failed to define "moral blameworthiness," failed clearly to indicate that evidence as to Hall's mental capacity could be considered as mitigating, and wrongly restricted the definition of mitigating evidence to "only that evidence which 'a juror might regard as reducing the defendant's moral blameworthiness.' " *See* Hall's Pet. at 47-52. Putting aside whether his assertions are even factually accurate,[9] Hall has failed to show that any of the complained-of instructions were contrary to, or involved an unreasonable application of, clearly established federal law as required. *See* 28 U.S.C. § 2254(d)(1). The Supreme Court case of *Penry v. Johnson*, 532 U.S. 782, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001), on which Hall heavily relies, notes that the key to a constitutional sentencing scheme is that the jury be able to consider and give effect to a defendant's mitigating evidence in imposing a sentence. *See Penry*, 532 U.S. at 797, 121 S. Ct. 1910. Hall has failed to persuade the court that such was not the case here. Hall's final ground is therefore denied as well.

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[9] For example, Hall's assertion that the court's definition of mitigating evidence was restricted to "only that evidence which 'a juror might regard as reducing the defendant's moral blameworthiness,' " *see* Hall's Pet. at 49, is misleading. The

VI.
Order

For the reasons discussed herein,

The court ORDERS that Hall's petition be, and is hereby, denied.

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court instructed the jury to consider "all of the evidence" in deciding whether "there is sufficient mitigating circumstance ... to warrant that a sentence of life imprisonment rather than a death sentence be imposed." *See* Vol. 3 of the Clerk's Record at 234.

Appendix E

Court of Criminal Appeals of Texas,
En banc.

Michael Wayne HALL, Appellant,
v.
The STATE of Texas.

No. 73787.

May 5, 2004.

Opinion Dissenting from
Denial of Rehearing Sept. 15, 2004.

Before the court en banc.

OPINION

KELLER, P.J., delivered the opinion of the Court in which MEYERS, PRICE, WOMACK, KEASLER, HERVEY and COCHRAN, JJ., joined.

In accordance with instructions from the United States Supreme Court, we reconsider this case in light of *Atkins v. Virginia*.[1] We shall affirm.

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[1] 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

I. BACKGROUND

A. Procedural history

In January of 2000, appellant's trial for capital murder began. At trial, evidence was introduced by both parties regarding whether appellant was mentally retarded. This evidence was introduced primarily in the punishment phase in connection with a determination of the mitigation special issue. At no point did appellant request that the trial judge or the jury make a specific fact-finding as to whether appellant was in fact mentally retarded.[2]

Appellant was subsequently convicted of capital murder and sentenced to death. In his eighth and ninth points of error on direct appeal, he alleged that inflicting the death penalty on the mentally retarded violates due process and constitutes cruel and unusual punishment under the United States Constitution. On January 16, 2002, this Court affirmed his conviction and sentence.[3] In a published opinion, we held that there was no *per se* bar to executing mentally retarded persons.[4] We also pointed out that the State presented some

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[2] Appellant did not contend in his original appellate brief or his brief on remand that he ever made such a request, no such request is contained in the record references supplied in the brief, the State does not contend that such a request was made, and we have not seen such a request in what appear to be the pertinent portions of the record. Appellant shoulders the responsibility of citing all the applicable facts and the record references supporting those facts. TEX. R. APP. P. 38.1(f).

[3] *Hall v. State*, 67 S.W.3d 870 (Tex. Crim. App. 2002).

[4] *Id.* at 877-878.

evidence that appellant was *not* mentally retarded and that the jury had the opportunity to observe appellant's behavior first-hand in a videotaped interview.[5]

After our decision was handed down, appellant petitioned the United States Supreme Court for a writ of *certiorari*. He also filed a state application for writ of habeas corpus, pursuant to Article 11.071.[6] In both of these proceedings, he pursued his mental retardation claim. On June 20, 2002, the Supreme Court decided *Atkins*.[7] On August 5, 2002, in the habeas action, the trial court designated the issue of whether appellant was mentally retarded as a previously unresolved fact issue and ordered a hearing by way of affidavits. On October 7, 2002, the Supreme Court vacated our judgment on direct appeal and remanded the case to us for reconsideration in light of *Atkins*.[8] On December 3, 2002, after reviewing the trial record and the affidavits submitted by the parties, and relying upon personal recollection of the events occurring at trial,[9] the habeas trial court adopted the State's proposed findings of facts and conclusions of law, concluding that appellant is not, in fact, mentally retarded. On February 26, 2003, we denied relief on the habeas

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[5] *Id.* at 578.

[6] All references to articles are to the Texas Code of Criminal Procedure.

[7] *See Atkins.*

[8] *Hall v. Texas*, 537 U.S. 802, 123 S. Ct. 70, 154 L. Ed. 2d 4 (2002).

[9] Judge Sharen Wilson presided at both the trial and the habeas proceedings.

application in an order adopting the trial court's findings.[10]

B. Factual History

Appellant and his friend, Robert Neville, decided to kill someone. In pursuance of their plan, they purchased various weapons, including rifles, pellet guns, and a crossbow, along with ammunition. They decided to kill Amy Robinson, a former co-worker of appellant's at Kroger, because she was an easy target. Robinson suffered from a genetic disorder called Turner's syndrome. As a result, she stood only four feet five inches tall at the age of nineteen and had the mental capacity of a third or fourth grader. She was physically slow and trusted everyone. For this reason, appellant and Neville believed she would not put up a fight.

Appellant and Neville went to the Kroger store where Robinson worked, checked her schedule, and then waited for her to ride her bicycle down the street on her way to work. They persuaded her to go with them for a drive and promised they would take her back to work. They drove Robinson twelve miles away from the store to a remote field, where Neville shot at her with the crossbow but failed to hit her. Appellant then shot her in the leg with a pellet gun, and Neville shot her in the chest with a .22 caliber rifle. Appellant also shot her in the chest with the pellet gun several times. Neville then shot Robinson

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[10] *Ex Parte Hall*, No. 53,668-01, slip op. at 1-2 (Tex. Crim. App., February 26, 2003) (not designated for publication).

in the head, killing her instantly, because appellant worried someone would hear the loud noises that Robinson was making. Appellant and Neville returned to the scene of the crime a few days later. Appellant took keys and money from the victim's pocket, and Neville fired some more shots into her dead body. A few weeks later, the police arrested the two men as they tried to flee to Mexico.

C. Mental retardation evidence

1. *Trial*

During the guilt phase of trial, one State's witness, Tamara Campbell, testified briefly about appellant's mental ability. Campbell had been appellant's supervisor at Kroger. When asked whether appellant appeared to be mentally challenged, Campbell replied, "No. He was lazy, but he wasn't mentally challenged, in my opinion." However, according to Campbell, Amy Robinson was mentally challenged.

During the punishment phase, the parties introduced a substantial amount of evidence regarding appellant's level of intelligence. Karen Hall, appellant's mother, testified that appellant had always been slower than other children. At age five, he could not stack blocks. He was in special education classes from the first through the eighth grade, was placed in regular classes in ninth grade but could not handle them, and did not advance beyond the tenth grade. Karen further testified that appellant plays like an eight-year-old and associates with children who are eight, nine, and ten years old.

She catalogued a number of areas in which appellant was deficient, when compared to others his age: he could not count change, tell time from a traditional clock with hands, read a menu, use public transportation, use a vacuum cleaner without tearing it up, make his bed, and wash dishes. He also would not use a table knife; where a piece of meat, such as a pork chop, needed to be cut, appellant would tear it up with his hands. He also became easily lost within a few blocks from home, and he often chewed with his mouth open. She conceded that appellant could read and write at a fourth grade level, use the phone, operate a microwave, load and unload a dishwasher, use a pencil and pen, make a sandwich, brush his teeth, shave, and dress himself. She also testified that he read children's books and the Bible, and she admitted that appellant was able to read well enough to pass a written driver's license examination (after failing the computerized version). She also admitted that appellant has had at least one girlfriend his own age, and possibly two.

Damon Lee Hall, appellant's older brother, testified that, at age fourteen to fifteen, appellant associated with children ages eight to nine. Appellant had trouble explaining things-taking a long time to do so. He could understand directions only when they were given slowly. Appellant had difficulty understanding how to play pool and had trouble reading clocks with hands. Appellant also had trouble counting money and did not know when he was shortchanged. Damon testified that he once took advantage of appellant's deficiency to cheat him out of some of the proceeds of the sale of a video game console system.

Ken Traynor was a wood shop teacher when appellant went to school. At first, Traynor believed appellant was mentally disturbed, but he came to believe that appellant was simply lacking intelligence. Appellant could not do the simplest of tasks. He could not understand concepts even after repetition, and he would not remember how to do something from one day to the next. Mathematics was largely beyond appellant's ability. Even the simplest addition was sometimes a challenge, while multiplication and division were simply out of the question. Traynor recalled one assignment that took appellant eight weeks to complete, when it should have taken only two. However, Traynor also recalled that appellant had difficulty getting motivated to work-sometimes he would just stay in one place and sit. Appellant did successfully complete a video game console-something he was actually highly motivated to do. He sometimes stayed late to work on it. When asked about appellant's verbal abilities, Traynor replied that appellant did not have any trouble verbalizing his responses.

Cheryl Conner was a school psychologist at the time she testified, but she had taught appellant English, reading, and math during his freshman and sophomore years in high school. She estimated that appellant had the reading comprehension of a first-grader and the math ability of a third-grader. Appellant could add and subtract on paper but not in his head. He could not write complete sentences or paragraphs without significant prompting. He could follow only one instruction at a time-and sometimes he would fail at that. Conner had to set a five-minute

task timer to keep appellant on task or he would fall asleep or let his attention drift to the point where he would simply sit and stare. Some teachers commented that appellant drooled in class. He would often sleep in class and not do assignments. Some of the other teachers thought appellant was lazy, but Conner believed that appellant was very depressed. She believed appellant's inability to understand things caused him to give up and tune out. She did testify that appellant was apparently good at video games.

According to a Test of Non-verbal Intelligence (TONI), appellant had an IQ score of 84, while a Wechsler Intelligence Scale for Children-Revised exam (WISC-R) indicated an IQ of 71. Appellant's school classified him as "learning disabled," not as "mentally retarded." Appellant was classified as learning disabled because, in the opinion of the assessors, he failed to live up to his potential. Linda Akin assessed appellant's "adaptive behavior" using "informal measures." Akin concluded: "Results showed that the student's level of intellectual functioning is consistent with his or her adaptive behavior, with no significant deficits in either area." Conner disagreed with that assessment. Conner admitted, however, that depression can lower an IQ score.

Chris Bybee was appellant's math teacher during the 1995-96 school year. He characterized appellant as slow and difficult to motivate. Appellant could not perform multiplication or division. Based upon appellant's work, Bybee guessed that appellant's IQ

was in the upper 60s. Bybee admitted that appellant was unmotivated most of the time, was sometimes lazy, and sometimes slept in class.

Dr. Mark Cunningham was a clinical and forensic psychologist hired by the defense. Dr. Cunningham administered the Wechsler Adult Intelligence Scale, third edition, exam (WAIS-III)to appellant and obtained a full-scale IQ score of 67 with a three percent margin of error. Dr. Cunningham noted that a 1991 WISC-R exam had placed appellant's IQ at 71 with a five percent margin of error. At the time of the 1991 evaluation, appellant was classified as learning disabled, but at an earlier evaluation, conducted in 1988, appellant had been classified as mentally retarded.

Based upon interviews with Bybee, Conner, and Tina Dodson (appellant's stepmother), Dr. Cunningham concluded that appellant possessed adaptive behavior deficits in seven different areas: (1) independent functioning (eating, dressing, transportation), (2) economic activity (handling money), (3) language development, (4) self-direction (excessive passivity), (5) socialization (ability to interact with others), (6) social engagement, and (7) functional academics. In support of this conclusion, Dr. Cunningham cited the following observed behavior: appellant could not play cards, give directions to his home, identify nearby streets, or travel to his workplace on his own. Appellant would

not brush his teeth or use a table knife.[1] Appellant had no peer age friends or girlfriends beyond relatively brief relationships. He could not name artists in the music groups to which he listened and was amazed that others could do so. Appellant was easily cheated in trades and in selling things. He was generally gullible and easy to manipulate. Appellant required very specific, concrete instructions and was slow to comprehend or explain things. Appellant took little interest in the world around him and displayed low initiative.

Dr. Cunningham also administered the Wide Range Achievement Test, third edition, exam (WRAT III), designed to show a person's ability in the area of functional academics. Appellant's reading score placed him at an IQ of 59, his spelling score at an IQ of 51, and his arithmetic score at an IQ of 55. Dr. Cunningham concluded that appellant was indeed failing to live up to his potential, but his potential was mental retardation and appellant was scoring even worse than that. Dr. Cunningham commented on the TONI II exam, which had yielded an IQ of 84, by saying that the potential for inaccuracy in that test was high. The TONI test was designed primarily for students who were difficult to test, sometimes because they did not speak English, or were

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[1] Dr. Cunningham recited that appellant "tore his pork chop or his meat apart with his fingers unless his mom cut it for him." Although Dr. Cunningham did not cite Karen Hall as one of his sources for determining adaptive deficits, he apparently relied upon her to some degree perhaps from her trial testimony. Dr. Cunningham was exempted from the rule and Karen had testified before him.

paralyzed, or had some other disability not necessarily related to intelligence that impeded the effectiveness of the more comprehensive, individually-administered intelligence exams. Dr. Cunningham observed that the TONI-II exam was only fifteen minutes long, while an individually-administered intelligence exam took one and a half hours. In addition, the TONI-II was administered in a group setting, which made cheating (looking on someone else's paper) possible. Dr. Cunningham concluded that appellant would be classified as "mildly mentally retarded" under the DSM-IV[12] classification scheme. Dr. Cunningham also noted that appellant was exempted from taking the TAAS[13] test.

During cross-examination, Dr. Cunningham conceded that appellant had told some lies during their initial interview. Appellant had stated that he never fired a gun, that he never returned to the victim's body, and that he was under the influence of methamphetamine and marijuana. Appellant later admitted that he had stolen money from the victim's dead body. Appellant also remarked that his rights had not been read to him when he was arrested and that the police had no right to question him. Dr. Cunningham also testified that appellant said he was reading a Stephen King novel, a Dean Koontz novel, and the Bible.

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[12] *Diagnostic and Statistical Manual of the American Psychiatric Association, fourth edition.*

[13] *Texas Assessment of Academic Skills.*

The State called several rebuttal witnesses. The first was Dr. J. Randall Price, a clinical and forensic psychologist and a neuropsychologist. Dr. Price accepted the results obtained by Dr. Cunningham's IQ testing[14] but differed somewhat as to their significance. In Dr. Price's estimation, appellant might be borderline rather than mentally retarded:

> Q. Were you able to determine whether or not Michael Hall was mentally retarded?
>
> A. Well, I'm not as convinced that he is as Dr. Cunningham is. He is at that level where it's either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded. It's- it's sort of a judgment call.

Dr. Price did engage in his own adaptive behavior testing, using the Street Survival Skills Questionnaire. The results of that testing showed appellant's adaptive skills to be "pretty average." Appellant was borderline in three areas: time, using money, and measurements. He was average on tools, domestics, health and safety, personal services, and the use of functional signs.[15]

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[14] Due to a phenomenon known as the "practice effect," Dr. Price could not conduct his own testing. The "practice effect" occurs where a subject's knowledge of a previous IQ test affects the results of a test administered shortly thereafter. According to Dr. Price, a six-month interval between testing is deemed necessary to avoid this phenomenon and to yield a valid set of findings.

[15] Dr. Price examined in detail what appears to be a subcategory of one of these, denominated "the use of appliances,

Dr. Price further testified that, during his interview with appellant, appellant acted and talked like an adolescent or young adult. Appellant spoke in a fluent, articulate manner about his crime and related events in a coherent, logical way. His thought processes were on topic, logical, and goal-oriented. Appellant's thought processes appeared to flow "pretty normally" and the interview was like a normal conversation.

During cross-examination, Dr. Price testified that, taking into account the margin of error, Dr. Cunningham's IQ exams of appellant yielded an IQ range of 64 to 71 within a 90 percent confidence level. IQ testing at age twelve yielded an IQ range of 68 to 74 within a 90 percent confidence level. In response to defense questioning, Dr. Price also remarked that appellant used the word "concordance" on his own. In comparing IQ tests, Dr. Price estimated appellant's IQ to be right around 70. Dr. Price conceded that appellant could not think as fast or as well as 97 to 98 percent of the human population. On redirect, Dr. Price testified that, during interviews with himself and Dr. Cunningham, appellant had given a variety of statements minimizing his role in the offense and a variety of excuses for participating in the offense (alcohol, drugs, being "out of it," etc.).

Alan Boles, an eighteen-year-old college freshman, also testified. At age 16, Boles had worked at Kroger

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kitchen tools, and utensils," in which appellant was found to be average.

along with appellant. Boles testified that appellant taught him how to sack groceries. Boles never noticed anything "slow" about appellant. Although he was never formally qualified as an expert, Boles had some experience dealing with the mentally retarded: at the time of his testimony, he was part of a program for teaching sports to mentally challenged children.

The State also called Monica Zepeda to the stand. Zepeda testified that she worked as a waitress at a restaurant visited by appellant and Neville. Appellant ordered his own meal (fried catfish) and appeared to utilize eating utensils in a normal manner. Finally, Detective Richard Nutt testified that he had read appellant warnings mandated by Article 38.22, and appellant appeared to understand those warnings.

Several witnesses discussed appellant's head injuries. Karen Hall testified to several head injuries sustained by appellant during his childhood. She admitted that, in several of those incidents, appellant was not taken to a hospital. She alleged that three incidents caused him to be taken to a hospital. In one, a trailer fell on appellant's head and the doctors diagnosed appellant as probably having a slight concussion. In a second incident, he cut his eye open and had to have stitches. In the third incident, he suffered a whiplash injury in an auto accident. Karen admitted that a concussion was the most serious injury appellant had sustained.

While Dr. Cunningham reported obtaining information about head injuries from appellant's family members, he acknowledged that only one incident involving a laceration of appellant's nose could be independently verified in medical records. Dr. Cunningham also admitted that there were no medical records to verify that appellant ever suffered a concussion. Dr. Cunningham further testified that head injuries played a relatively minor role in his evaluation.

Dr. Price did not find the materials regarding head injuries to be particularly significant. In his view, the incidents did not represent serious enough injuries to cause any brain injury.

We note several other types of evidence that might be relevant to the question of whether appellant is or is not mentally retarded. Karen Hall and Dr. Cunningham testified that appellant was given Ritalin for attention deficit disorder. Karen also testified that appellant was physically abused by one of her boyfriends. Dr. Cunningham also testified that appellant was in a family atmosphere that included maternal alcoholism, observed domestic violence, physical abuse, traumatic sexual experience, and parental neglect.

Appellant's own words and actions are also relevant to this inquiry. At trial, appellant wrote a *pro se* motion to remove his attorneys. The motion was discussed in an *ex parte* hearing, outside the presence of the prosecuting attorneys. Although the motion contained only facts and no law, Judge

Cooke, the judge hearing the motion, commented that it was "well drafted" and that he could "name some attorneys that can't draw an instrument any better than this right now." Judge Cooke further commented that this motion, if discovered and used by the State, could damage appellant's attorneys' "diminished capacity" strategy by showing that appellant was actually "pretty bright," to be capable of drafting such a complicated document. After some discussion, appellant decided to withdraw his motion, and the judge ordered that the transcript of the hearing be sealed.[16]

Appellant also participated in an interview with Fox 4 News. This interview was videotaped, and the videotape was later played to the jury. On the videotape, appellant's speech was smooth and fluid, and his thought processes appeared to be coherent and logical. He stated that the victim was chosen because "she trusted us; it was easy." He bragged about his role in the murder: Neville could not have accomplished it on his own because it was appellant who got the victim to trust him. Without appellant, the victim would have escaped. Appellant acknowledged that he and Neville would be punished for killing the victim, and he expressed the hope that he would receive the death penalty. He wanted the death penalty because he had a "sucky-ass life." He indicated that he had tried to take his own life before but had failed: "You can't take your own life but you

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[16] A copy of the hearing transcript was available during the habeas proceedings although a sealed version was also included in the direct appeal record.

can take someone else's." He stated that the current method of execution, which allowed one to die sleeping, was better than the gas chamber or the electric chair. He thought killing the victim would be a good way to get the death penalty because that is what would happen to someone who killed a person with a family that cares about her. When asked whether he was forced to talk to the media, appellant responded that he was told, and understood, that he did not have to.

2. *Habeas corpus*

Appellant submitted the affidavits of two additional psychologists who opined that appellant was mentally retarded. Sally Church, a licensed professional counselor, licensed marriage and family therapist, and nationally certified school psychologist, licensed in Oklahoma, evaluated appellant's condition based upon his family history; school, medical, employment, jail, and prison records; previous evaluations; investigator's reports; court testimony and affidavits; and a psychodiagnostic evaluation of appellant conducted by her at the prison. Church testified that appellant's mother drank alcohol while she was pregnant, had difficulty with depression, was served in special education during public school, and was an overwhelmed, frustrated, abusive, and neglectful parent. Church further testified that appellant was identified in kindergarten as being behind his age norm developmentally, that he was served in special education throughout his public school attendance, that he dropped out in eleventh grade, that the

school recommended that he be identified as Mentally Handicapped but his mother declined-wanting him identified as Learning Disabled-and that he was never able to learn reading, math, spelling, and writing beyond the third grade level. She noted that he had vision problems that could be largely corrected with glasses and that he was assessed as having a hearing problem in elementary school, but there was no follow-up on the extent of his hearing loss. She stated that, by the age of ten, appellant had "experienced eleven head injuries, several of which resulted in concussions." She also noted that appellant had been prescribed Ritalin for inattention, impulsivity, and hyperactivity. In her opinion appellant is mentally retarded, being less intelligent than 98 percent of the human population, with an IQ score of 67. She stated that appellant has critical deficits in adaptive skills and behaviors and that it is "highly doubtful that he alone could meet the needs of his day to day life."

She also stated that appellant's physical appearance was unusual. She characterized his appearance as typical of Fetal Alcohol Syndrome or Fetal Alcohol Effect. She stated that he also exhibited characteristics that resemble other genetic disorders such as XXY, Kleinfelter Syndrome; YYX, Extra Y Chromosome; or Fragile X Syndrome. She noted that all of these disorders are related to mental retardation and are present at birth.

Dr. George Denkowski, a psychologist licensed by the State of Texas and certified by the Texas Department of Mental Health and Mental

Retardation to conduct evaluations for the purpose of diagnosing mental retardation, also expressed the opinion that appellant is mentally retarded. He noted that a WISC-R test administered to appellant in 1991 (at age twelve) resulted in a full-scale IQ score of 71, a TONI-2 test administered at age 16 resulted in a score of 84, and a TONI-3 test administered at age 20 resulted in a score of 77. However, he considered the TONI tests to be "unreliable indices of general intellectual functioning." Dr. Denkowski also relied upon Dr. Cunningham's adaptive deficits evaluation based upon interviews with Conner and Bybee. And he relied upon the WRAT-III administered by Dr. Cunningham and the K-FAST[17] test administered by Dr. Price to show that appellant's academic skills were seriously deficient. The K-FAST test results indicated that appellant's arithmetic skills and reading skills were less proficient than those of 99 percent and 95 percent of same-aged persons, respectively. Finally, Dr. Denkowski criticized the Street Skills Survival Questionnaire as being an inaccurate tool for diagnosing mental retardation in an adult. Dr. Denkowski did not personally interview appellant.

Appellant also submitted affidavits from his trial attorneys, a fellow death-row inmate, two defense private investigators, and a former teacher. All of these people opined that appellant was mentally retarded. William Harris, one of the trial attorneys, stated that he had numerous opportunities to

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[17] *Kaufman Functional Academic Skills Test.*

observe appellant's mental limitations. Harris found that, even after multiple explanations, appellant could not grasp the law of parties and why the law of parties made him liable for capital murder. Appellant also had little or no sense of what things cost or what may or may not be available to a jail inmate. Harris also commented that appellant "was fairly adept at masking his mental retardation if you only deal with him superficially."

Paul Conner, appellant's other trial attorney, stated that appellant would ask the same questions day after day showing an inability to remember or grasp the answers. Appellant would mask his retardation by not asking questions. He would sometimes sound more informed on a subject than expected, but this was because he would parrot words and phrases that he heard, without grasping their meanings.

Bill Coble, a fellow death row inmate, occupied a cell immediately adjacent to appellant's. Coble remarked that appellant was called "Half Deck" by the prison guards and other inmates on death row. He characterized appellant as slow in his thinking and "worse off than Johnny Penry" whom he also knew about. Appellant could not learn the meanings of new words, even when told their meanings over and over again. Due to his lack of understanding of money, he could not handle buying items from the prison commissary. Appellant had to be reminded every day to wash himself, shave, and clean the toilet. He also had to be reminded how to keep his food container and his bedding clean. Appellant would often "space out" and forget what he had just

done. He listened to cartoons on the radio (on a television sound setting) and could parrot what he heard, if it was something he has heard over and over again. Coble stated that appellant was very upset to learn about a civil suit against himself and Kroger regarding Robinson's death. Appellant thought he could get another death penalty from the civil suit.

Joseph Ward, a private investigator appointed to assist the defense in habeas corpus proceedings, stated that appellant's ability to understand the subject of conversation appeared to be significantly less than that of others his age. Appellant's demeanor was childlike, and he acted inappropriately for someone his age. He could not recall or meaningfully relate events surrounding his arrest. He had difficulty remembering the other private investigator's name even though he had just been told the name. Appellant did not know the meanings of many words, would use words inappropriately, and would mispronounce them. The other private investigator, John Ladd, stated that appellant had an attention span of five minutes and talking to him was like talking to a six- or seven-year-old child.

Stephen Dollar, a licensed attorney at the time of the habeas action, was appellant's world history teacher during the 1995-96 school year. Dollar testified that appellant could not follow instructions or complete assignments as distributed. Appellant displayed no cognitive ability in the classroom and demonstrated behaviors similar to those of a child with a diagnosis

of mental retardation. He would not respond to his own name when called upon and would stare out the window and drool most of the class hour. Appellant could not accomplish the most menial of tasks, even when they were simplified to accommodate his special education needs. He appeared to have no friends, and he was an object of ridicule by his fellow students.

The State presented controverting affidavits. Five prison guards-Brandon Daniel, Julie Perego, Suzanne Prosperie, Todd Tatum, and Darrell White-averred that appellant is not mentally retarded. Daniel, who was assigned to appellant's area about one day a week, said that appellant "acts as normal as anyone in his pod." He further stated that he "had been around people who were slow mentally" but had "not seen that in" appellant. Further, there was no indication that appellant did not understand how to obey orders and follow prison rules. Under Daniel's observations, appellant was "just a normal inmate."

Since Perego arrived at the prison unit in June of 2001, she saw "nothing unusual" in appellant's conduct that was "different from [that of] the other inmates." She characterized his behavior as "normal" and said that she never had to tell him what to do more than once. She further stated, "I have never seen anything that would make me think Michael Hall is mentally retarded and he seems pretty normal to me in my observations of him."

Prosperie saw appellant, on average, two days a week. Hall seemed like "just a normal inmate." He

socialized with other inmates, and there was nothing unusual about his conduct or attitude. She remarked that his cell was filthy, but it was so by his choice. She stated that she had not seen any signs of mental retardation or illness since she had been around him, and she had some experience with mental retardation because her neighbor's daughter was mentally retarded. She had never heard appellant referred to as "Half Deck" by anyone.

In his three months around appellant, Tatum "observed nothing unusual" about him. Although appellant's hygiene was not the best, he had "learned the system here" and understood what he was doing. Tatum knew some children in school with Down's syndrome, but he had not seen anything in appellant to indicate that he is mentally retarded.

White had also worked around appellant for three months. He stated that he had not observed anything unusual about appellant's conduct and that appellant appeared to be "just a normal inmate." He had no problems with appellant failing to understand anything he told appellant to do. Appellant took showers, brushed his teeth, and did other normal activities. White had an uncle who was mentally retarded and had to be told repeatedly what to do, and appellant was nothing like his uncle. White further stated, "I have seen nothing in my observations of Michael Hall that makes me think he is mentally retarded."

The State also presented affidavits of Dr. Price. Referring to his opinion given at trial, Dr. Price

stated that appellant's "intelligence fell either in the borderline range of intellectual functioning (IQ = 70-84) or in the upper end of mild mental retardation (IQ = 50-55 to 70)." Based upon his review of various tests and records, Dr. Price opined that appellant was a poor student but does not have significant adaptive deficits. He concluded: "My review of this case does not clearly indicate that Michael Hall is mentally retarded." In response to Dr. Church's affidavit, Dr. Price stated that appellant did *not* exhibit signs or symptoms associated with genetic disorders such as Fetal Alcohol Syndrome, Kleinfelter's Syndrome, Extra Y Chromosome, or Fragile X Syndrome.

II. ANALYSIS

A. General considerations

In *Atkins*, the Supreme Court held that the Eighth Amendment's "cruel and unusual punishments" clause prohibits the execution of mentally retarded persons.[18] The Supreme Court left to the States the task of fashioning appropriate procedures for determining who is in fact mentally retarded:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired

[18] 536 U.S. at 321, 122 S. Ct. 2242.

> as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright* [477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335], with regard to insanity, "we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[19]

In the habeas context, we recently adopted temporary guidelines, to be used during the legislative interregnum, for determining whether a defendant is mentally retarded.[20] Under these guidelines, a person is considered mentally retarded if he has these three characteristics: (1) "significantly subaverage general intellectual functioning" (an IQ of about 70 or below), (2) "related limitations in adaptive functioning," and (3) onset of the above two characteristics before age eighteen.[21] Expert testimony is relevant to a fact-finder's determination of these factors but is not necessarily conclusive.[22] A separate jury determination of mental retardation is not required,[23] and at least on habeas corpus, the defendant shoulders the burden of showing his mental retardation by a preponderance of the evidence.[24] And we afford almost total deference to the trial judge's findings of fact, especially when

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[19] *Atkins*, 536 U.S. at 317, 122 S. Ct. 2242 (citation omitted).
[20] *Ex parte Briseno*, 2004 WL 244826.
[21] *Id.* at *3, *3 n.24.
[22] *Id.* at *4.
[23] *Id.* at *4-*5.
[24] *Id.* at *5-*6.

those findings of fact are based upon credibility and demeanor.[25]

Unlike *Briseno*, the present case is still pending on direct appeal. Issues are often evaluated differently in the habeas corpus and direct appeal contexts. Some claims fail on direct appeal because the record is not sufficiently developed to evaluate the claims. This occurs most often with ineffective assistance of counsel claims.[26] Other claims may be evaluated under a different (more onerous) standard in the habeas context than in the direct appeal context.[27] Neither of these differences are material to the case at hand.

B. The habeas record and judicial notice

Had *Atkins* been handed down before our original opinion on direct appeal, a serious question about the adequacy of the direct appeal record would have been before us. While the parties introduced a significant amount of evidence regarding whether appellant was

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[25] *Id.* at *6.

[26] *Thompson v. State*, 9 S.W.3d 808, 813-814 (Tex. Crim. App. 1999) (direct appeal record often inadequate in the ineffective assistance of counsel context, especially when counsel is not asked for his reasons for his conduct).

[27] *Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1996), *cert. denied*, 521 U.S. 1122, 117 S. Ct. 2517, 138 L. Ed. 2d 1019 (1997) (standard of harm more onerous on the defendant); *compare Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (on habeas, newly discovered evidence must unquestionably establish innocence) *and Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003) (in motion for new trial context, newly discovered evidence must be "probably true" and "will probably bring about a different result on retrial").

mentally retarded, mental retardation was not considered as a discrete issue by the trial judge or the jury. Although the parties certainly had incentive to litigate the question of appellant's intelligence, the litigation occurred as a question of degree: defense counsel could contend that appellant's low intelligence mitigated his moral culpability even if it did not amount to mental retardation, while the State could contend that, even if appellant were in the mental retardation range, he appreciated the consequences of his actions to a sufficient degree to deserve the death penalty. Had mental retardation been an ultimate issue, the parties may well have litigated the issue even more robustly than they did, as the issue would be a question of kind (which side of the mental divide appellant was on) rather than degree (how much did appellant appreciate the immorality of his conduct).

We did not address the adequacy of the direct appeal record on original submission because, at that time, we did not perceive mental retardation as a bar to execution. But the trial court and this Court did have the benefit of *Atkins* during the habeas proceedings. The parties had ample opportunity to present evidence at that time on the specific issue of mental retardation.

And we can consider the habeas proceedings and evidence in the current posture of this appeal. Over three decades ago, we addressed one of those rare instances in which we considered a particular issue on direct appeal after evidence had been obtained on

that issue in habeas proceedings.[28] In *Huffman v. State*, the defendant filed a motion for new trial, alleging newly discovered evidence.[29] This motion was not accompanied by affidavits supporting the allegation.[30] While his appeal was pending, the defendant was released from custody due to an oversight.[31] This Court dismissed the appeal on the ground that the defendant's absence from custody was the equivalent of an escape.[32] The defendant was subsequently granted an out-of-time appeal by the Fifth Circuit.[33] After the right to appeal was granted but before the appeal was filed, a hearing was held on a state application for writ of habeas corpus challenging the same conviction.[34] Evidence not contained in the appellate record was presented at this hearing, including the alleged newly discovered evidence and evidence that the defendant was not represented by counsel at the time the motion for new trial was filed.[35]

We held that this Court could properly take judicial notice on direct appeal of the habeas proceedings and consider the evidence developed at the habeas hearing.[36] Finding that the defendant was without counsel when the motion for new trial was filed, we

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[28] *Huffman v. State*, 479 S.W.2d 62 (Tex. Crim. App. 1972).
[29] *Id.* at 68.
[30] *Id.*
[31] *Id.* at 64.
[32] *Id.*
[33] *Id.* at 63.
[34] *Id.* at 64.
[35] *Id.* at 64, 68.
[36] *Id.* at 68.

considered the merits of his newly discovered evidence claim in light of the habeas record and overruled his points of error.[37]

The present case is on all fours with *Huffman*: as in that case, we are faced in a direct appeal with an issue that has already been presented to us on habeas corpus. Consequently, we address appellant's mental retardation in light of both the direct appeal and the habeas records. In this vein, we reject any notion that the direct appeal record in this case must be viewed in isolation. The additional, habeas evidence is before us; taking it into account is necessary for a complete and accurate view of appellant's intellectual capabilities.[38]

C. Burdens of proof and standards of review

That standards for evaluating a claim sometimes differ from appeal to habeas is also of no concern here. While direct appeal standards may apply to a claim on direct appeal even though the claim is supported by evidence obtained in judicially noticed

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[37] *Id.* at 68-69.

[38] Moreover, appellant can hardly complain about an appellate court's failure to limit its review to the direct appeal record when he did not request a finding on the issue at trial, and thus, did not attempt to ensure that the direct appeal record would contain a comprehensive litigation of the issue. *See Martinez v. State*, 867 S.W.2d 30, 33-34 (Tex. Crim. App. 1993), *cert. denied*, 512 U.S. 1246, 114 S. Ct. 2765, 129 L. Ed. 2d 879 (1994) (defendant could not rely upon evidence of prior adjudication of insanity to establish in-sanity when he failed to give notice at trial that he wanted to pursue an insanity defense).

habeas corpus proceedings,[39] if a substantive component of a particular type of claim already contains a standard that equals or exceeds the applicable standard on habeas corpus, then the inquiry collapses to analyzing the claim by its components.[40] In the present case, we decide that mental retardation is comparable to an affirmative defense, and thus, the burden is always upon the defendant to prove that condition by a preponderance of the evidence. So, the standards for proving mental retardation at trial and on habeas are the same, and the resulting standard of review of a trial court's findings against the defendant are also the same in both contexts.

The groundwork for this conclusion has already been laid in *Briseno*. There we observed that the issue of mental retardation is similar to the issues of insanity, competency to stand trial, and competency to be executed-all of which impose upon the defendant a preponderance of the evidence burden of proof.[41] We now also observe that the mental retardation issue could be described as a confession-and-avoidance type of punishment-mitigating factor, which would make it like several statutory punishment-mitigating factors that carry the same proof standard as affirmative defenses: sudden passion in the murder context,[42] release in a safe

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[39] *See Huffman*, 479 S.W.2d at 68-69 (applying motion for new trial standard for newly discovered evidence).

[40] *Fierro*, 934 S.W.2d at 373.

[41] *Briseno*, at *5-*6.

[42] TEX. PEN. CODE § 19.02(d).

place for the offense of aggravated kidnapping,[43] imperfect renunciation for the offense of organized criminal activity,[44] and, at least arguably, imperfect renunciation for inchoate offenses.[45] The counter-example would be the mitigation special issue in capital cases, for which the Legislature has prescribed no burden of proof.[46] But the mitigation special issue is a very broad issue, capable of taking into account a wide range of circumstances. By contrast, mental retardation is a single, discrete fact that by itself mitigates the penalty for capital murder, just as sudden passion, release in a safe place, and renunciation all are discrete facts that by themselves mitigate the penalty for their respective crimes. Given the legislative backdrop for similar affirmative defenses and analogous punishment mitigating factors, we find, absent further legislative guidance, that mental retardation is the type of issue that must be proven by the defendant by a preponderance of the evidence-regardless of when the claim is presented.

From that conclusion, it follows that the standard of review is also the same. Giving "almost total deference to a trial judge's determination of the

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[43] TEX. PEN. CODE § 20.04(d).

[44] TEX. PEN. CODE § 71.02(d).

[45] TEX. PEN. CODE § 15.04(d)(no explicit burden placed in the subsection but contained within section that describes successful renunciation as an "affirmative defense").

[46] *See* Art. 37.071, § 2(e)(1); *Mosley v. State*, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070, 119 S. Ct. 1466, 143 L. Ed. 2d 550 (1999).

historical facts supported by the record"[47] in the habeas context is essentially the same as *Jackson v. Virginia's* requirement that the evidence be viewed "in the light most favorable to the prosecution" when the findings are adverse to the defendant.[48] Given the same burden, the standard of deference will also be the same, whether the Court conducts a sufficiency review of a mental retardation claim decided at trial or a legal review of a trial court's recommendation on habeas corpus.

D. The mental retardation claim

We now turn to the merits of appellant's claim. His claim has already been addressed on habeas corpus and found to be without merit. The trial court considered the entire trial record and the additional evidence presented in the habeas proceedings. The trial court made its findings after *Atkins* was decided and after the Supreme Court had remanded the direct appeal in this case. The trial court's consideration of the mental retardation claim and our review in the habeas proceedings satisfied the mandate of *Atkins*, and we believe that taking judicial notice of the habeas proceeding and its

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[47] *Briseno*, at *6.

[48] *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt....This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.").

outcome satisfies the Supreme Court's remand order in the present case. Because the burden of proof and the standard of review are the same on this issue on direct appeal and in habeas proceedings and because we can properly notice the habeas evidence on direct appeal, our conclusion on direct appeal is necessarily the same as our conclusion in the habeas proceedings.

In an abundance of caution, however, we have re-reviewed the evidence, and the result of that review is that our conclusion has not changed. While appellant supported his claim of mental retardation with the testimony of three psychologists, his mother, his brother, his trial attorneys, two private investigators, four teachers, and a fellow death row inmate, the State controverted his claim with the testimony of a psychologist, five prison guards, a waitress, appellant's former work supervisor, a former co-worker, and a police detective. The State also controverted the claim through cross-examination, pointing to school records indicating that appellant was not mentally retarded. There is also the videotaped interview, the hearing on the defendant's *pro se* motion to remove his attorneys, and of course, the circumstances of the crime itself. While there was significant evidence in favor of a finding of mental retardation, there was also significant evidence against such a finding. The trial judge, who presided over the trial and the habeas proceedings, was in the best position to evaluate the conflicting evidence. Her findings, which we have judicially noticed in the current direct appeal, deserve great deference. Because the trial court's

conclusion that appellant is not mentally retarded is supported by the record, we should and do defer to that conclusion.[49]

The judgment of the trial court is affirmed.

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[49] Although appellant is not entitled to a review limited to the trial record, we note that our holding would not change if we considered only the evidence submitted at trial. A conclusion that appellant is not mentally retarded is supported by the trial record.

PRICE, J., filed a concurring opinion in which COCHRAN, J., joined.

JOHNSON, J., filed a dissenting opinion in which HOLCOMB, J., joined.

HOLCOMB, J., filed a dissenting opinion. PRICE, J., concurring, in which COCHRAN, J., joined.

I agree with the majority that we may consider the habeas record in deciding this direct appeal on remand from the United States Supreme Court. I also agree that the record in this case supports the trial court's conclusion in habeas proceedings that the appellant is not mentally retarded. I write separately to point out that, generally, for the review of a contested *Atkins v. Virginia*[1] claim, the trial court will need to hold a live hearing and not base its decision solely on affidavits submitted by the parties.

The habeas proceedings in this case of which we took judicial notice were conducted by affidavit without a live hearing. In this case, the extensive affidavits provide ample evidence from which the trial court could make its findings that the applicant is not mentally retarded. But this is a unique case.

When an applicant's status as a mentally retarded person is contested, a hearing by affidavit will generally be inadequate. The main reason we defer to a trial judge's findings is that he is in a better position to determine credibility and determination by seeing and hearing a witness testify. We often say that because we have only a cold record, reviewing courts do not have the best vantage point from which

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[1] 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

to make factual determinations.[2] Live testimony allows the convicting court to observe a witness's demeanor, which can add significant information to credibility determinations. Also, opposing counsel may cross examine witnesses to test the content of a witness's testimony. These valuable aspects of live testimony are not available in a hearing by affidavit.

Code of Criminal Procedure Article 11.071, Section 9(a) states the "[t]o resolve the [previously unresolved] issues [of fact] the [convicting] court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection." But, if the convicting court conducts a hearing by affidavit, and the affidavits are inadequate for us to review the convicting court's findings, we will be forced to remand to the convicting court for a live hearing, especially if the parties voice objections to the convicting court's findings. The best course to resolve a contested *Atkins* claim is to hold a hearing at which live testimony is received.

With these comments, I join the majority.

JOHNSON, J., dissenting, joined by HOLCOMB, J.
I respectfully dissent. Retardation, like insanity, is a question of fact, not law. We may speak of satisfying the legal standard for insanity, but we assign the task of determining if a defendant was insane at the time of the offense to the finder of fact, usually the jury. In this case, the trial court made a finding of

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[2] *See Manzi v. State*, 88 S.W.3d 240, 254 (Tex. Crim. App. 2002) (Cochran, J., concurring).

fact (applicant is not retarded) based solely on affidavits (written factual statements) and from that finding of fact drew a legal conclusion (under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), it is not unconstitutional to execute him).

This case was tried before the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and radically changed the law. We are not free to ignore that change.

Almost all of the evidence that has been brought forward by either side was adduced during the punishment phase of the original trial. At that time, mental retardation was a mitigating factor, not a dispositive issue as to ineligibility for the death penalty; the convicting jury was limited to considering it as part of the special issues, particularly on the issue of future dangerousness. No trier of fact in this case has ever heard live testimony, subject to testing on cross-examination, on the specific issue of whether appellant is mentally retarded. The hearing at issue here was had on affidavits only, thus Appellant's claim that he is mentally retarded, and therefore is not subject to execution, has never been directly and thoroughly litigated.

That a live, contested hearing is necessary is clear from an examination of the conflicting evidence adduced at trial. A short summary of the testimony

from the punishment phase of appellant's trial illustrates this.

Of the fourteen defense witnesses whose testimony about appellant's mental abilities was considered at the hearing on the writ of *habeas corpus*, five also testified at trial and had extensive contact with appellant: his mother, Karen Hall; his brother, Damon Hall; and teachers Ken Traynor, Cheryl Conner, and Chris Bryce. A psychologist, Dr. Mark Cunningham, also testified at trial. Four others with extensive contact with appellant testified by affidavits on the writ of *habeas corpus*: a teacher, Stephen Dollar; appellant's trial attorneys, William Harris and Pat Conner; and another death-row inmate, Bill Coble. The other affiants were two private investigators hired by appellant's trial attorneys, Joseph Ward and John Ladd, and two psychologists, Dr. George Denkowski, and Dr. Sally Church. Linda Akin, an employee of the school district, did not testify at trial or submit an affidavit. She was mentioned in Dr. Conner's trial testimony in response to a question from the prosecutor during cross-examination of Dr. Conner regarding the IQ test that was done by Garland schools as part of the comprehensive individual assessment.[1] It is not even

[1] Q. Okay. Now, one other thing I wanted to ask you about. On the assessment that was done during the testing, it says, and maybe you can interpret this for me, "The student's adaptive behavior was assessed using informal measures. Results showed that the student's level of intellectual functioning is consistent with his or her adaptive behavior, with no significant deficits in either area."
Do you know what they meant by that?

certain that Ms. Akin wrote the assessment under discussion, and in any case, that assessment was not admitted into evidence.

Of particular interest here are the affidavits of appellant's attorneys and others who helped prepare appellant's case for trial. Both attorneys attested that appellant would ask a question, listen to the answer, say that he understood, then re-ask the same question within a very short time, sometimes within minutes; he showed little to no understanding of many of the aspects of trial. They soon recognized that appellant "bitterly did not want people to think him 'dumb' " and would parrot words and phrases he had heard in an effort to avoid appearing so. Both investigators attested that appellant behaved in ways inappropriate to his age and did not seem to be able to recall events such as his arrest. Mr. Ladd recounted that appellant thought himself very clever for being able to get extra food for an evening snack when, in reality, he was merely saving some of his supper for later.

Bill Coble has occupied the cell next to appellant as long as appellant has been on death row. Mr. Coble has been on death row for a long time, knows Johnny

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A: Yes, I do.
Q: Okay, do you agree with it?
A: No.
Q: Okay. Do you know who prepared that report?
A: I believe the last one was prepared by Linda Akin.
Q: Who? I'm sorry.
A: Linda Akin.
Q: Okay. And is she with the school district?
A: Yes, she is.

Paul Penry, and in his opinion, appellant "is worse off than Johnny Penry."

Of the ten state witnesses who claimed personal contact with appellant, none had extensive or lengthy contact with appellant. Dr. Randall Price, a psychologist, had a single interview with appellant. Al Boles said that appellant taught him how to perform the simple task of bagging groceries. His testimony, under questioning by the state, consisted largely of a comparison of the mental limitations of appellant and those of the victim. Monica Zepeda was a waitress who had a single contact with appellant. The state represented to the trial court that she was able to testify that appellant showed no remorse; no such testimony was elicited. Richard Nutt, a detective, testified that he had read the Miranda warnings to appellant, and that he believed that appellant understood them because he had looked Nutt in the eye and said he understood.

The affidavits of the five prison guards each consist of a few conclusory statements, which are not infrequently repetitive. Many of the statements in these affidavits, such as "I have heard Michael Hall's radio on in his cell," are not helpful in assessing appellant's mental abilities. Brandon Daniel worked on death row once a week. Suzanne Prosperie worked on death row twice a week. Todd Tatum and Darrell White worked on death row for three months. The affidavit of Julie Perego consists of 6 general, conclusory statements, including "I have been on this unit since June 2001 and I have been around Michael Hall at different times."

Mental retardation can arise in many ways. The National Center on Birth Defects and Developmental Disabilities[2] states that retardation may occur before birth,[3] during birth,[4] or after birth from disease or injury.[5] The United States National Library of Medicine lists more than forty causes, the largest category being unexplained.[6] Many persons who are, in fact, mentally retarded may appear normal to the untrained eye or on casual contact and are not identifiable by their manner of speech or their appearance. A single casual contact, such as waiting on a mildly mentally retarded person in a restaurant, has a high probability of not revealing the retardation.

Lay persons often have unrealistic ideas about what mentally retarded persons look like and how they act. There is a wide range of abilities encompassed by the term "mentally retarded"; the term applies equally to those whose are able to live successful independent lives and to those who live and die in a

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[2] http://www.cdc.gov/ncbdd/dd/ddmr.htm.

[3] Such causes include: an error in number of chromosomes (Down's syndrome), defects in chromosomes (fragile X, Angelman and Prader-Willi syndromes), missing chromosomes (Cri-du-chat syndrome), mis-located chromosomes, metabolic disorders (phenylketonuria), maternal disease or drug use (rubella, fetal alcohol syndrome, cocaine or amphetamine abuse), maternal malnutrition, and physical abnormalities (hydrocephalus).

[4] Such causes include: HIV, asphyxia, and birth trauma.

[5] Such causes include: head injury, stroke, meningitis, lead poisoning, malnutrition, very high bilirubin levels, and abuse such as shaking.

[6] http://www.nlm.nih.gov/medlineplus/ency/article/001523/htm.

vegetative state. Mr. Tatum attested that he "knew some kids in school with Down's syndrome" and that appellant is not retarded. It is well known that Down's syndrome creates a distinctive physical appearance. If Down's syndrome is Mr. Tatum's standard for diagnosing mental retardation, then of course, appellant is not retarded in his eyes. Ms. Prosperie claimed to know that appellant is not retarded because her neighbor's daughter is retarded. We do not know the extent of that child's retardation or how it manifests in appearance and behavior. Mr. White said that appellant is not retarded because his uncle is retarded, and appellant is not like his uncle. Mr. Boles, looking back to the time of the offense, says that appellant is not retarded, and the state asserts that Boles is qualified to make that judgment because he now works with mentally challenged children. Each of these lay witnesses appear to have judged appellant's mental capacity by personal standards formed by personal experience with a very small number of retarded persons. Given the wide range of manifestations of mental retardation, these witnesses, although sincere, do not have the experience or training to make any assessment of the mental abilities of appellant.

Even the state's psychologist, Dr. Price, appeared to be uncertain as to appellant's mental abilities. He did not testify that appellant is not mentally retarded but rather that his "review of this case does not clearly indicate that [appellant] is mentally retarded," and he conceded that appellant's intelligence "fell either in the borderline range of

intellectual functioning (IQ = 70-84) or in the upper end of mild mental retardation (IQ =50-55 to 70)." Our definition of mental retardation encompasses parts of both ranges. Dr. Price also stated that "[t]here is no doubt that Mr. Hall has low intelligence and poor academic abilities...."

The state argues that appellant's assignment to special education classes was based on "learning disabilities," a claim that is refuted by school records that indicate that the school wished to designate him as mentally retarded, but did not do so at his mother's request. The state conceded in its answer to appellant's application for writ that appellant had passed the written portion of the driving license examination only after his mother worked with him for three days.[7] The state further urged that the trial court should entirely ignore the testimony of Dr. Church because, although having appropriate credentials, she was licensed as a psychologist only in Oklahoma.

I am loathe to find that appellant is not mentally retarded when that finding is based largely on the lay opinions of a store supervisor, a waitress, a bag boy, and five prison guards, and the expert opinion of a psychologist who could not reach a definite conclusion, especially when all had limited contact with appellant. I am unpersuaded that bragging or using big words and claiming to read classic literature establishes that appellant is not retarded.

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[7] In his affidavit, Dr. Denkowski attests that appellant passed on the third try but was never able to pass the driving test.

If appellant is, in fact, retarded, his statements may establish only that he, like many retarded persons, wishes to be regarded as "normal" and "smart" and that he will behave in ways that he thinks will cause others to regard him as such, just as persons with normal intelligence will behave in ways that are perceived as producing acceptance. As Dr. Church noted in her affidavit, appellant "had difficulty with the requirements of doing the work of a 'stocker' and was demoted to bagging groceries." She also stated, "His main motivation is not to appear to be a 'dummy' in order to mask his deficits. He tends to say what he has heard others say and/or to say what he thinks others expect him to say. This is not at all unusual as a coping mechanism for the mentally retarded population."

Nor are persons with limited mental abilities immune from other human foibles, such as lying. A well-drafted motion may be the product of a skilled jailhouse writ writer. Persons with limited mental ability often do extremely well in structured environments, and I cannot think of a more structured environment than death row.

It may very well be that a full hearing on appellant's claim of mental retardation, with the opportunity to cross-examine witnesses and argue the significance of their testimony, would establish that appellant is not retarded. However, we will never know unless we order that full hearing and have before us both the tested testimony of persons who are knowledgeable in the mental-health field and relevant lay testimony about his adaptive behavior.

I respectfully dissent.

HOLCOMB, J., dissenting.

I do not dispute that, in general, this Court can properly take judicial notice on direct appeal of a habeas proceeding, consider the evidence developed at a hearing on habeas, and afford almost total deference to a trial judge's determination of the historical facts supported by the record. However, in this case, determining appellant's claim of mental retardation by considering the evidence developed on habeas in addition to that adduced at trial does not provide appellant with a constitutionally sufficient opportunity and process to resolve his claim. Also, based on the deficiencies in the habeas proceeding, we should not, in this case, afford the trial court's finding on habeas almost total deference.

I discussed many of my reasons for these conclusions in my dissent in *Ex parte Briseno*, including the fact that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), requiring a jury determination of certain issues, applies to mental retardation. Recognizing that this Court's majority holding in *Briseno* is now the law, I continue to find deficiencies in the habeas proceeding on which this Court relies in deferring to the trial court's determination and in arriving at its own conclusion.

Nowhere in Hall's habeas proceeding was there a burden of proof or standard of review enunciated. The convicting court made findings and conclusions, but we do not know under what standard of proof the court made its conclusions-preponderance of the

evidence, clear and convincing evidence, or beyond a reasonable doubt. Furthermore, Hall was not provided with a live evidentiary hearing. Hall was not able to cross examine the affiants and the judge was not able to evaluate their credibility. By according almost complete deference to the trial court's determination based on the procedure used on habeas, and by reaching our own conclusions based in part on the evidence adduced by affidavit on habeas, we fail to provide a procedure that reflects the need for heightened procedural requirements in determining whether a defendant may be put to death.

I think this Court should reconsider, *sua sponte*, our determination on Hall's writ of habeas corpus and order the convicting court to conduct a live evidentiary hearing and evaluate the evidence under the preponderance of the evidence standard articulated in *Briseno*. Barring that course of action, I would find that a rational jury could have found that the significant evidence adduced in favor of a finding of mental retardation outweighed the significant evidence adduced against such finding. I would therefore find that appellant has met his burden to be granted the relief he seeks, commutation to a life sentence. Because this Court follows neither course I have laid out, I respectfully dissent.

ON APPELLANT'S MOTION FOR REHEARING

HOLCOMB, J., dissenting.

This case is in an unusual procedural posture and was at one time both on direct appeal (on remand from the United States Supreme Court) and under consideration for appellant's state claim for habeas corpus relief. We chose to apply the record from the habeas hearing to the issue of mental retardation raised on direct appeal. We even suggested that the evidence in the habeas court, which was presented by affidavit and not by live testimony, was almost unsuitable for a proper review of the issue. This dissent, however, is not about whether I believe appellant is mentally retarded; I have no reason to believe that the habeas court was incorrect in its assessment of the evidence before it. I simply believe that we must apply the law as I see it.

In the past, I thought *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), required a jury determination, even on habeas, of a claim of mental retardation brought under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The case of *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 442, though, held otherwise for cases on habeas review. However, that same holding means that an *Atkins* claim, if still on direct appeal, is required to be considered and applied "prospectively." We have held that an *Atkins* claim is equivalent to an affirmative defense. If we believe that, then we must believe that a jury must consider the fact issue presented by this equivalent of an affirmative defense.

Ring, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v.*

Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, all stand for the proposition that a factor that increases a sentence must be found by a jury beyond a reasonable doubt. With *Atkins* we are talking about the equivalent of an affirmative defense rather than simply an increase in the sentence. A successful *Atkins* claim can *decrease* a death sentence to the only alternative, a life sentence. I believe it logically correct to say that, if the claim which would entitle a defendant to a life sentence is not considered by a jury and the decision is made by the trial court, the trial court's decision is equivalent to an *increase* in the sentence from life to death. Therefore, a jury must address the issue of mental retardation in this case.

Because this case is still on direct appeal and the issue of mental retardation must be addressed by a jury, this Court should remand the case for a jury determination of whether appellant's mental ability is "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus" against their execution. *Atkins v. Virginia*, 536 U.S. at 317, 122 S. Ct. 2242. Since the majority does not so hold, I respectfully dissent.

Appendix F

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

Tarrant County, Texas,
No. 53,668-01

Ex Parte Michael Wayne HALL

ON APPLICATION FOR WRIT OF HABEAS
CORPUS FROM TARRANT COUNTY

Per Curiam. Holcomb, J., would file and set on allegation No. (1).

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, TEX. CODE CRIM. PROC.

On February 18, 2000, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, TEX. CODE CRIM. PROC., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Hall v. State*, 67 S.W.3d 870 (Tex. Crim. App. 2002). However, the United States Supreme Court granted certiorari, vacated the opinion, and remanded the case to this Court for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002). *See Hall v. Texas*, 123 S. Ct. 70 (2002).

Applicant presents six allegations in his application in which he challenges the validity of his conviction and resulting sentence. In his first allegation, applicant asserts that his death sentence violates the constitutional prohibition against cruel and unusual punishment because he is mentally retarded. *See id.* Because no fact-finder had ever answered the specific question of whether applicant is mentally retarded, the trial court determined that a controverted, previously unresolved factual issue material to the legality of applicant's confinement existed and ordered a hearing by affidavit on the issue. *See* TEX. CODE CUM. PROC. art. 11.071, § 9. After affidavits were presented by both parties, the judge considered the entire record and entered findings of fact and conclusions of law as to all of the allegations presented. The trial court recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied.

IT IS SO ORDERED THIS THE 26TH DAY OF FEBRUARY, 2003.

Do Not Publish

A True Copy
Attest
Tony C. Bennett, Jr., Clerk
Court of Criminal Appeals of Texas
By /s/ _____
Clerk

Appendix G

C-371-5782-0685479-A

EX PARTE	§	IN THE 371ST DISTRICT
	§	COURT
	§	
MICHAEL WAYNE HALL	§	COURT NUMBER ONE
	§	
	§	TARRANT COUNTY, TEXAS,

ORDER

Having carefully reviewed the State's Proposed Findings of Fact and Conclusions of Law filed on November 6, 2002, and the Applicant's Proposed Findings of Fact and Conclusions of Law filed on November 27, 2002, and having further determined that the State's Findings are supported by the record and that the State's Conclusions are legally sound, the Court hereby orders, adjudges and decrees that the State's Proposed Findings of Fact and Conclusions of Law are adopted as the Court's own. The Court further orders and directs:

1. The Clerk of this Court to file these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals pursuant to TEX.CODECRIM.PROC.ANN.art.11.071, § 9(f).

2. The Clerk of this Court to furnish a copy of this Order to Applicant's attorneys, Larry M. Moore, at Law Offices of Moore & Cummings, 4210 West Vickery Blvd., Fort Worth, Texas,

76107, or at Mr. Moore's most recent address; and Wm. Reagan Wynn, at The Kearney Law Firm, 505 Main Street, Suite 220, Fort Worth, Texas, 76102, or at Mr. Wynn's most recent address; by mailing said documents by United States mail.

SIGNED AND ENTERED on this the 3rd day of December, 2002.

/s/
JUDGE PRESIDING

Appendix H

C-371-5782-0685479-A

EX PARTE	§	IN THE 371ST DISTRICT
	§	COURT
MICHAEL WAYNE HALL	§	COURT NUMBER ONE
	§	TARRANT COUNTY, TEXAS,
	§	

November 6, 2002.

STATE'S PROPOSED MEMORANDUM, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

COMES NOW, The State of Texas, by and through the Criminal District Attorney of Tarrant County, Texas, and files its proposed memorandum, findings of fact, and conclusions of law.

MEMORANDUM

On February 18, 2000, a jury convicted Applicant of capital murder for the kidnapping-murder of Amy Robinson. CR 3: 226. On February 23, 2000, in accordance with the jury's answers to the three special issues, the trial court imposed a sentence of death by lethal injection. CR: 3: 237-38.

On January 16, 2002, the Court of Criminal Appeals of Texas affirmed this Court's judgment on direct appeal. *See Hall v. State*, 67 S.W.3d 870 (Tex. Crim. App. 2002), *vacated and remanded*, 2002 U.S. LEXIS 5402 (October 7, 2002). On October 7, 2002, the United States Supreme Court granted Applicant's petition for writ of certiorari, vacated the Court of Criminal Appeals' judgment, and remanded the case to the Court of Criminal Appeals for "further

consideration" in light of *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), which held that it violates the Eighth Amendment to execute mentally retarded capital offenders. *See Hall v. Texas*, 2002 U.S. LEXIS 5402 (October 7, 2002).

The current application, which is Applicant's first, was filed pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.071 on January 17, 2002. Following a motion for extension, the State timely replied on July 16, 2002. On August 5, 2002, the Court designated the issue of whether Applicant is mentally retarded as a previously unresolved fact issue and ordered a hearing by way of affidavits. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9(a). The parties have filed additional affidavits and documents addressing the designated issue.

The Court has reviewed the Application for Writ of Habeas Corpus and the exhibits attached thereto, the State's Reply to Application for Writ of Habeas Corpus and the exhibits attached thereto, the record and exhibits from Applicant's trial, the affidavits and other records filed by the parties as a result of the Court's order for a hearing by way of affidavits, and the other documents contained in the writ transcript. Where appropriate, the Court has used personal recollection of Applicant's trial. *See id.* (allowing court to use personal recollection in resolving issues). Based upon its review, the Court makes the following findings and concludes as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact - Ground for Relief Number One: Applicant alleges that imposition of the death penalty violates his federal and state constitutional right to be free from cruel and unusual punishment because he is mentally retarded. [*See* Application at 3-15.]

I. In *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), the Supreme Court held that it constitutes excessive punishment to execute mentally retarded capital offenders. The Court expressly left to the states the task of developing appropriate ways to enforce the constitutional restriction upon the execution of sentences and offered no guidance for determining which capital offenders fall within its purview. *See id.* at 2250.

A. Texas has not yet adopted specific procedures to enforce the constitutional restrictions of *Atkins*.

B. When the Supreme Court declared that the Eighth Amendment prohibited the execution of insane/incompetent offenders, but provided no procedural guidelines, *see Ford v. Wainwright*, 477 U.S. 399 (1986), the Court of Criminal Appeals opted to permit the issue to be determined by the convicting court in a habeas proceeding. *See Ex parte Jordan*, 758 S.W.2d 250, 254 (Tex. Crim. App. 1988). Similarly, in this case, TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9 provides an appropriate

mechanism to litigate the issue of Applicant's mental retardation claim in compliance with Eighth Amendment dictates.

II. With regard to the psychologists' affidavits submitted by the parties in this proceeding, the Court finds the following:

A. The State has submitted two affidavits from Jack Randall Price, Ph.D. [*See* Affidavit of Jack Randall Price, Ph.D., dated 10-5-02; Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, attached to State's Reply as State's Exhibit B.] In addition, Dr. Price testified on behalf of the State during the punishment phase of Applicant's trial, and the Court observed his testimony.

1. Dr. Price is a clinical and, forensic psychologist and neuropsychologist licensed to practice psychology in Texas and Kentucky. [RR 35: 186, 188; Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1; Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 1.]

2. Dr. Price has consulted in more than 150 capital murder cases and hundreds of civil and non-capital murder cases. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1.] He has been retained by both the defense and the prosecution in

state and federal cases and has testified in capital cases approximately seventy percent of the time at the request of the defense and thirty percent of the time at the request of the prosecution. [RR 35: 188; Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1.] Many of Dr. Price's clinical and forensic cases have involved the issue of the diagnosis of mental retardation as well as other mental disorders. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1.]

3. Dr. Price conducted a psychological evaluation of Applicant over a three-day period in February 2000. [RR 35: 192; Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 2; Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 2.] He prepared a report immediately following his evaluation of Applicant. [Attachment B to Affidavit of Jack Randall Price, Ph.D., dated 10-5-02.]

4. In preparing his affidavit dated October 5, 2002, Dr. Price reviewed his entire file and new materials. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 2.] Dr. Price based the affidavit on his professional training and experience, a reasonable degree of scientific

psychological certainty, and the following sources of information: videotaped statement of Michael Hall and Robert Neville filmed in Eagle Pass, Texas; statements given by Michael Hall on March 3, 1998; Tarrant County Jail records; school records from the Garland Independent School District; approximately seven and a half hours of direct, face-to-face evaluation of Applicant in February 2000, including a clinical interview and history, mental status examination, and the administration of the Street Survival Skills Questionnaire (SSSQ) and the Kaufman Functional Academic Skills Test (K-FAST); approximately thirty-two hours of observation of trial testimony and his own testimony at Applicant's trial; consultation with both the prosecution and the defense attorneys (*i.e.*, Alan Levy and William Harris) and with Mark Cunningham, Ph.D., the defense's expert psychologist at trial; records from Baylor Medical Center related to Applicant; records of the Texas Department of Criminal Justice-Institutional Division; Application for Writ of Habeas Corpus; State's Reply to Application for Writ of Habeas Corpus; transcript of the Hearing on Defendant's Pro Se Motion; affidavits

submitted by Applicant from Joseph D. Ward, Bill Coble, Stephen Dollar, Lilli C. Hallam, Sally Church, Ph.D., William Harris, John Ladd, and Paul Conner; the opinion of the Court of Criminal Appeals of Texas on direct appeal; his April 2002 affidavit; his own trial testimony; and the affidavit of George Carl Denkowski, Ph.D. [*See id.* at 2-3.]

B. Applicant has filed an affidavit from George Carl Denkowski, Ph.D., dated September 19, 2002. [*See* Affidavit of George Carl Denkowski, Ph.D.]

1. Dr. Denkowski is a psychologist licensed in Texas and certified by the Texas Department of Mental Health and Mental Retardation to conduct evaluations for the purpose of diagnosing mental retardation. [*Id.* at 1.]

2. This is Dr. Denkowski's second case involving the appeal of the death penalty on the basis of mental retardation. [*Id.* at 2.]

3. Under the Rules of Practice promulgated by the Texas State Board of Examiners of Psychologists, Texas licensees must not render a written or oral opinion about an individual's psychological characteristics without conducting an

examination of the individual unless the opinion contains a statement that the licensee did not conduct an examination of the individual. *See* 22 TEX. ADMIN. CODE § 465.18(b)(3). Moreover, a written or oral opinion about an individual's psychological characteristics rendered by a licensee who did not conduct an examination of that individual must contain clarification of the extent to which this limits the reliability and validity of the opinion and the conclusions and recommendations of the licensee. *See id.* at § 465.18(b)(4).

a. Dr. Denkowski's affidavit contains no express statement that he did not evaluate Applicant. It appears that Dr. Denkowski based his opinions on his review of "records provided to [him] by the Kearney Law Firm and its agents"; however, Dr. Denkowski fails to identify the records he reviewed. [Affidavit of George Carl Denkowski, Ph.D., at p. 2.]

b. Dr. Denkowski's affidavit contains no statement related to the limitations' on the reliability and validity of his opinions, conclusions, and recommendations related to his

> diagnosis of mental retardation in this case. Rather, Dr. Denkowski makes an unqualified conclusion that his analysis of records in this case "convincingly establishes the disability of mental retardation" [*id.* at 3] and that "*it is therefore clear that [Applicant] meets the diagnostic criteria for mental retardation.*" [*Id.* at 19 (emphasis in original).]

4. Because Dr. Denkowski has not conducted a face-to-face evaluation of Applicant, has not indicated what records he reviewed in rendering his opinion in this case, and has not stated the limitations on his opinion resulting from his failure to meet Applicant, Dr. Denkowski's opinions and conclusions regarding Applicant's mental status and his criticisms of Dr. Price's professional opinion in this cause are of no value in determining whether Applicant is a mentally retarded offender who is exempt from the death penalty.

5. Even if the Court considered Dr. Denkowski's affidavit, the Court's findings of fact and conclusions of law set forth below would remain unchanged.

C. Applicant has provided an affidavit from Sally Church, Ph.D., who reviewed various records and conducted a psychodiagnostic evaluation of Applicant on death row. [*See* Affidavit of Sally Church at p. 1-2.]

1. Dr. Church is a licensed psychologist in Oklahoma, but nothing indicates that she is licensed in Texas. [*Id.* at 1.] Therefore, her evaluation and diagnosis of Applicant will be given no weight in determining whether Applicant is a mentally retarded person. *See* TEX. HEALTH & SAFETY CODE ANN. § 591.003(16) ("person with mental retardation" is a person determined by a *physician or psychologist licensed in Texas* or certified by the Texas Department of Mental Health and Mental Retardation to have subaverage general intellectual functioning with deficits in adaptive behavior).

2. Even if the Court considered Dr. Church's affidavit, the Court's findings of fact and conclusions of law set forth below would remain unchanged.

III. This Court will resolve the issue of whether Applicant is mentally retarded by applying the definition set forth in TEX. HEALTH & SAFETY CODE ANN. § 591.003(13). The definition has been used by the Court of Criminal Appeals, *see*

Ex parte Tennard, 960 S.W.2d 57, 60-63 (Tex. Crim. App. 1997), *cert. denied*, 524 U.S. 956 (1998), and was employed in House Bill 236, which was passed by the Texas Legislature to ban the execution of mentally retarded offenders but vetoed by the governor in 2001. Furthermore, the section 591.003(13) is consistent with the definition advocated by the parties and applied by their experts.

IV. Under TEX. HEALTH & SAFETY CODE ANN. § 591.003(13), "mental retardation" means "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." All three criteria of the definition must be met before a person can be considered mentally retarded. *See* David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1319-20 (1993).

V. "Subaverage general intellectual functioning" refers to "measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used." TEX. HEALTH & SAFETY CODE ANN. § 591.003(20). To meet this criterion, a person must have an IQ test score of 70 or less. [RR 34: 192.] *See Ex parte Tennard*, 960 S.W.2d at 60-61; Rumley, 24 ST. MARY'S L.J. at 1316-17. IQ scores standing alone are unreliable and should not be used as a unitary measure of

mental retardation. *See Ex parte Tennard*, 960 S.W.2d at 61 (citing Rumley, 24 ST. MARY'S L.J. at 1329-35 (discussing various reasons that IQ scores are unreliable)). A low IQ score alone does not provide a justifiable basis for classifying a person as mentally retarded. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985); *Stevenson v. State*, 73 S.W.3d 914, 917 (Tex. Crim. App. 2002); *Ex parte Tennard*, 960 S.W.2d at 61.

A. Prior to trial, Applicant obtained a full-scale IQ score of 67 on the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) administered by the defense's psychologist at trial, Mark Cunningham, Ph.D. [RR 34: 188; Affidavit of Jack Randall Price, dated 4-9-02, at p. 2.] Taking into account the standard error of measurement; there is a 90 percent likelihood that Applicant's true IQ falls between 64 and 70. [RR 34: 188-89.]

B. Dr. Price relied on Applicant's WAIS-III score of 67 obtained by Dr. Cunningham in order to avoid any artificially inflated data due to "practice effect" that could occur from readministration of the test too soon. [Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 2; RR 35: 190.]

C. After his conviction, Applicant obtained a full scale IQ score of 72 on the WAIS-III:

[Affidavit of George Carl Denkowski, Ph.D., at p. 10.]

D. In 1991, Applicant obtained a full scale IQ score of 71 on the Wechsler Intelligence Scale for Children Revised (WISC-R). [Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 2; RR 34: 47, 189; 35: 230-31.] This full scale score was one point above mental retardation. [RR 34: 59.] Given the standard error of measurement, Applicant's IQ score ranged from 66 to 76. [RR 35: 189.]

E. While there is no question that Applicant has had learning problems throughout his life, his intelligence test results do not clearly place him in the range of mild mental retardation. [Affidavit of Jack Randall Price dated 10-5-02, at p. 9; Affidavit of Jack Randall Price dated 4-9-02, at p. 2.] IQ test scores must be considered in terms of the standard error of measurement rather than raising the cutoff score for diagnosing mental retardation. [Affidavit of Jack Randall Price, dated 10-5-02, at p. 7.] The most scientific way to look at IQ scores is that every IQ should be considered in terms of measurement error, not just by the full-scale score. [*Id.*] Thus, Applicant's IQ score places his intelligence level either in the borderline range of intellectual functioning or in the upper end of mild mental retardation. [*Id.* at 9;

Affidavit of Jack Randall Price dated 4-9-02, at p. 2; RR 35: 196, 213, 226.]

VI. "Adaptive behavior" refers to "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." TEX. HEALTH & SAFETY CODE ANN. § 591.003(1). It encompasses the things a person does to get by in daily life. [RR 35: 200.] Adaptive behavior refers to how well an individual copes with common life demands as compared to individuals of similar age and circumstance. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 7.]

A. Adaptive behavior is an important component in the diagnosis of mental retardation due to the imprecision in the cutoff score and the exact nature of how measurement error is to be considered. [*Id.*] The assessment of adaptive behaviors is included in an evaluation for mental retardation in order to reduce reliance on IQ scores as the sole criteria because reliance on IQ scores alone has a history of over-diagnosing mental retardation. [*Id.*]

1. While adaptive behavior measures can provide useful information about the extent to which an individual responds to the demands of everyday life, the interpretation of standardized behavior scores — especially in connection with assessments of

intellectual ability in the diagnosis of mental retardation requires clinical judgment. [*Mental Retardation: Definition, Classification, and System of Supports* at 85 (10th ed., AAMR 2000), attached to Affidavit of Lilli C. Hallam.]

2. While the DSM-IV-TR recommends gathering information on adaptive functioning from multiple sources, including archival records and adaptive behavior scales, any technique utilized should be suitable to the context of the evaluation. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 8.]

B. Information from Dr. Price's face-to-face evaluation and interviews of Applicant in February 2000, as well as Dr. Price's findings related thereto, supply evidence relevant to assessing Applicant's level of adaptive behavior.

1. Applicant was well-groomed. [Attachment B to Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1.]

2. Applicant's hearing, motor skills, attention, and concentration appeared to be within normal limits. [*Id.*]

3. Applicant spoke in a fluent, articulate way and related his version of the crime in a logical, coherent way. [RR

35: 219.] Applicant was "spontaneous and quite verbal." [Attachment B to Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1.] He responded to all questions and sometimes offered information without questioning. [*Id.*] Applicant followed the line of questioning and answered the questions, his thought processes flowed "pretty normally," and it was a normal conversation. [RR 35: 193-94.]

4. Applicant was absolutely oriented, and his thought processes were on topic, logical, and goal-centered. [RR 35: 192-93; Attachment B to Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1.] His thought content was generally focused on religion, jury selection, and the trial. [Attachment B to Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1; RR 35: 194.] Applicant related details of how he thought his case should be defended at trial. [RR 35: 220-21.]

5. Dr. Price explained Applicant's right regarding the evaluation. [Attachment B to Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at 1.] Applicant told Dr. Price that he had discussed the evaluation with his attorney and that he understood the nature of the process. [*Id.*]

6. During Dr. Price's evaluation, Applicant discussed a variety of topics either in response to interview questions or spontaneously. [*Id.* at 13-23.] Dr. Price's notes of these discussions demonstrate Applicant's ability to communicate effectively, to understand his case and the legal proceedings, to make decisions and perform tasks in his daily life, to read and comprehend the Bible, to understand and express his religious beliefs, to discuss his relationship with his co-defendant and the victim, and to discuss his role in Robinson's kidnapping and murder. [*Id.*] The entirety of the questions and responses are incorporated into these findings of fact. [*Id.*]

7. Dr. Price administered the SSSQ, which measures knowledge of adaptive behaviors and skills. [Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 3; RR 35: 192.]

    a. Although the normative sample of the SSSQ is limited and the test has a "low ceiling," it provides objective information that can be helpful in assessing an individual's adaptation. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 9.]

b. Dr. Price's assessment of Applicant's adaptive abilities utilized, but did not entirely rely upon, the SSSQ. [*Id.*]

c. The strengths of the SSSQ are that it derives information directly from the person being assessed, it is quantitative and standardized, and the score can be compared to groups with average and low intelligence. [RR 35: 202.] The disadvantage is that the SSSQ only tests knowledge about adaptive skills and does not test whether the skills are applied consistently in regular life. [RR 35: 202-03.]

d. Applicant's knowledge about adaptive skills was "pretty average." [RR 35: 201.] If Applicant's adaptive skills are grouped in a composite, Applicant is at the "low average" area in terms of his knowledge of adaptive skills and behavior. [RR 35: 201.]

e. Applicant's knowledge of adaptive behavior compared to individuals with average intelligence ranged from the borderline level in some areas (*i.e.*, understanding and telling

time, handling money, and using common measurements) to the average level in other areas (*i.e.*, recognizing and understanding basic spatial/quantitative concepts, functional signs, tools, kitchen utensils, hygiene, safety skills, and the use of public services). [Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 3; RR 35: 200-01.]

8. Dr. Price administered the K-FAST, which is designed to determine a person's performance in reading and mathematics as applied to daily life situations. [Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 3; RR 35: 192.] Applicant scored in the 1st percentile in practical arithmetic and in the 5th percentile in functional reading. [Affidavit of Jack Randall Price, dated 4-9-02, at p. 3.]

9. Applicant participated in the daily routine of the Tarrant County Jail. [RR 35: 214.] He told Dr. Price that he read the Bible, exercised and played sports in the gym, read Stephen King and Dean Koontz novels, and watched television. [RR 35: 214-15.]

10. Applicant read aloud to Dr. Price from the Bible, accurately stated the theme of Revelation, found verses in the

Bible when asked to do so, and explained the verses accurately. [RR 35: 215.] Applicant told Dr. Price that his Bible had a concordance, which helped him understand better. [*Id.*]

11. Applicant's low intelligence level did not impair his ability to fully understand the nature and consequences of his crime. [RR 35: 223, 261.] Applicant understands the significance of committing murder and what it means to take a person's life. [RR 35: 196.] Applicant bas the mental capability to make choices, [RR 35: 197.] Dr. Price also assessed Applicant's co-defendant, Robert Neville, and found no evidence that Neville manipulated Applicant or duped him into murdering Robinson. [RR 35: 189, 262.]

12. Applicant's intelligence was estimated to be borderline. [Attachment B to Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 1.]

C. On September 20, 2002, the Court granted the State's motion to unseal the reporter's record from a "Hearing on Defendant's Pro Se Motion," which occurred on January 10, 2000. [*See generally* RR of Hearing on Defendant's Pro Se Motion.] The record from the bearing, which has been filed as part of the record in this habeas

proceeding, provides useful and relevant information regarding Applicant's ability to communicate and comprehend matters concerning his case. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 9.]

1. The only persons present during the hearing on the pro se motion were Judge C.C. "Kit" Cooke, Applicant, Applicant's trial attorneys (Paul Conner and William Harris), the bailiffs, the court clerk, and the court reporter. [RR of Hearing on Defendant's Pro Se Motion at 5.]

2. Applicant requested new trial attorneys and gave Judge Cooke a written motion to quash. [*Id.* at 7-8, 20.]

3. Applicant presented his request and motion without assistance from his attorneys, understood the questions and comments directed at him by Judge Cooke, and voiced his opinions and concerns articulately and at length. [*See generally id.* at 6-31.]

4. Applicant drafted the pro se motion and wrote it all out himself. [*Id.* at 23.]

5. Judge Cooke characterized Applicant's pro se motion to quash as "pretty well written," "well drafted," and "well done." [*Id.* at 23-24.] He

advised Applicant that the pro se motion could interfere with the defense at trial because the State might use the motion to show that Applicant was "pretty bright because [he had] sufficient intellect to draft a complicated document like this." [*Id.* at 24.] Judge Cooke further stated with regard to the motion, "I can tell you right now I can name some attorneys that can't draw an instrument any better than this right now." [*Id.* at 26.]

6. Judge Cooke explained to Applicant that the motion could work against Applicant if he was planning to present a mitigation defense based upon his past in special education or that the motion might be considered some type of admission which could interfere with his attorneys' ability to present his case at trial. [*Id.* at 24-27.]

7. After Applicant conferred with his attorneys, he decided to withdraw his motion. [*Id.* at 26-27.] Applicant also withdrew his "dismissal of counsel," stating that it "was a misunderstanding between client and lawyers." [*Id.* at 28.]

8. During the hearing, Applicant articulated his perception of his trial counsel's performance, explained the

same to Judge Cooke, and utilized some sophistication related to legal processes such as drafting his pro se motion. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at 9.] Applicant further was able to understand that the motion he had drafted might be deleterious to his case in the long run and to decide to withdraw the motion. [*Id.*]

D. The observations of death-row personnel who have had contact with Applicant provide additional relevant evidence of Applicant's level of adaptive behavior. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 9.]

1. Applicant acts like a normal inmate on death row and exhibits no unusual behavior. [Affidavit of Brandon Daniel at p. 1-2; Affidavit of Julie Perego at p. 1-2; Affidavit of Todd Raymond Tatum at p. 2; Affidavit of Darrell J. White at p. 1-2; Statement of Susan Prosperie, attached to State's Reply as State's Exhibit E.]

2. Applicant obeys orders, follows prison rules, communicates with other inmates, is capable of doing the normal things that inmates do, and functions and copes like any inmate. [Affidavit of Brandon Daniel at p. 1, 2; Affidavit of Julie Perego at p. 1;

Affidavit of Todd Raymond Tatum at p. 1-2; Affidavit of Darrell J. White at p. 1-2; Statement of Susan Prosperie, attached to State's Reply as State's Exhibit E.]

3. Polunsky Unit guard Susan Prosperie never heard anyone refer to Applicant as "Half Deck." [Statement of Susan Prosperie, attached to State's Reply as State's Exhibit E.]

4. Several guards submitting affidavits and statements have various experiences with persons who are mentally retarded or slow, and they have not observed any evidence of mental retardation in Applicant. [Affidavit of Brandon Daniel at p. 1; Affidavit of Todd Raymond Tatum at p. 2; Affidavit of Darrel J. White at p. 1-2; Statement of Susan Prosperie, attached to State's Reply as State's Exhibit E.]

5. Polunsky Unit guard Darrell J. White has no problems with Applicant failing to understand anything White tells him to do. [Affidavit of Darrell J. White at p. 1.] Applicant is nothing like White's mentally retarded uncle, whom White must repeatedly tell what to do. [*Id.* at 2.]

6. Polunsky Unit guard Julie Perego has never had to tell Applicant what to do

more than once and has never seen anything to make her think that Applicant is mentally retarded. [Affidavit of Julie Perego at p. 1-2.]

E. On March 5, 1998, Applicant agreed to speak to the media in a videotaped interview. A portion of the interview was played for the jury at the guilt-innocence phase of Applicant's trial as State's Exhibit 77, and the entire interview was played to the jury as State's Exhibit 86 during punishment. Applicant's videotaped media interview provides relevant evidence useful in assessing Applicant's adaptive behavior. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 9.]

1. Applicant's videotaped media interview is a fair representation of Applicant's conversational skills and ability to express himself. [RR 35: 197, 264-65; *see* State's Exhibit 77, 86.]

2. Portions of the videotape show a "bit of manipulative trait" in Applicant, a lack of empathy for the victim, blaming others, and glibness. [RR 35: 266.]

3. In the interview, Applicant boasted that he was the person who "got [Robinson] out there," that he "got her to trust him," and that Robinson would have escaped had Neville

attempted the crime alone. [State's Exhibit 86.] When Neville considered backing out, Applicant pulled out his pellet gun and said, "We're going to do it." [*Id.*] Applicant acknowledged being the first one to shoot Robinson. [*Id.*] He lamented that he fired only the pellet gun when shooting Robinson, while Neville got to shoot her using the .22-caliber rifle. [*Id.*]

F. The facts of the offense demonstrate that Robinson's kidnapping and murder were part of a methodical; premeditated scheme. Applicant's participation in the offense with Neville and his discussion of Robinson's kidnapping, torture, and murder with the media and law enforcement demonstrate Applicant's adaptive abilities.

1. Dr. Price evaluated both Applicant and co-defendant Neville and found no evidence that Neville manipulated Applicant or duped him into committing this offense. [RR 35: 262.]

2. Applicant told the media that he and Neville thought for a while about killing someone. [State's Exhibit 86.] Applicant wanted to kill people because he had a "sucky-ass life." [*Id.*] Applicant and Neville did not kill anyone other than Robinson because

law enforcement was closing in on them. [*Id.*]

3. At one point during the search for a victim, Applicant and Neville "dressed up in [their] black clothes to kill someone downtown," but they "could never find the right target." [State's Exhibit 84.] They became "agitated" when they could not find a victim, so they "just picked" former coworker Robinson because they knew her, she trusted them, and she was "easy to get." [State's Exhibit 84, 86.] In Applicant's words, he and Neville picked Robinson "because she was the closest, the most trusting, didn't have to leave no bruises or anything like that ... all the other people, you try to take 'em out there they'll be fightin' [for] their life out there." [State's Exhibit 86.]

4. Applicant and Neville considered Robinson to be an "easy mark." [*Id.*] Nineteen-year-old Robinson had Turner's Syndrome, a genetic disease that made her small and slow mentally and physically. [RR 31: 19, 208-10.] She stood about four-feet-five-inches tall and appeared to be at the third or fourth grade level. [RR 31: 22, 210.] She was slower than Applicant. [RR 35: 274-75.] She trusted everyone. [RR 31: 21, 208.]

5. In the days leading up to Robinson's murder, Applicant and Neville obtained rifles, a crossbow, pellet guns, and ammunition. [RR 31: 213-23; State's Exhibit 84.] Although only Neville actually handled the rifles when he and Applicant were at the pawn shop to buy them, Applicant was the one who pointed out the rifles on the shelf to Neville. [RR 31: 217.]

6. On the day of the murder, Applicant and Neville went out looking for Robinson in order to carry out their murderous plan. [State's Exhibit 86.] They checked her schedule at the Kroger grocery store where they had been her coworkers and then lay in wait for her to ride by on her bicycle on her way to work. [State's Exhibit 84, 86.] When the pair saw Robinson, they coaxed her into the car for a ride, promising to take her to work after driving in the country. [*Id.*]

7. Robinson complained that she did not want to be late to work, so Applicant put a pellet gun to her head, and he laughed when later recalling that she did not think he would use it. [*Id.*] When Robinson continued to complain, Neville pretended to have a flat tire and pulled over on a dirt road by a remote field about twelve miles from Kroger. [RR 31: 161; State's

Exhibit 84, 86.] Applicant and Neville got out of the car and walked into the field carrying weapons while an unsuspecting Robinson stayed in the car listening to the radio. [State's Exhibit 84, 86.] When Neville considered backing out of committing the crime, Applicant pulled out his pellet gun and said, "We're going to do it." [State's Exhibit 86.]

8. At some point, Applicant persuaded Robinson to get out of the car and go to an area where Neville could fire a crossbow at her. [RR 33: 49; State's Exhibit 86.] Neville missed several shots, and Robinson became angry when the last arrow grazed her hair. [State's Exhibit 84, 86.] When Robinson started walking back to the car, Applicant shot her in the back of the leg with his pellet gun. [*Id.*] Applicant and Neville laughed when Amy cried out in pain. [*Id.*] Applicant proudly informed Robinson that he, not Neville, had shot her. [State's Exhibit 86.]

9. Applicant maneuvered Robinson back out into the field, and Neville shot her in the chest with a .22-caliber rifle. [State's Exhibit 84, 86.] Applicant then shot her in the chest "three or four or six times" with the pellet gun. [State's Exhibit 86.] Robinson fell to

the ground, making loud noises and shaking. [*Id.*] Applicant stood over Robinson, staring at her for five or ten minutes. [*Id.*]

10. Applicant was worried that someone would hear Robinson's noises, so Neville shot her in the head, killing her instantly. [*Id.*] Applicant and Neville then left Robinson behind a hill where extensive vegetation obscured her body so that she could not be seen from the road. [RR 31: 142.]

11. A few days later, Applicant and Neville returned to the scene. [State's Exhibit 84, 86.] Neville fired shots into Robinson's dead body, and Applicant removed Robinson's keys and money from her pocket. [*Id.*; RR 33:51.]

12. A few weeks later, fearing that they would be caught, the pair fled Arlington, but were arrested attempting to cross the border into Mexico. [RR. 31: 75-83, 87-90, 104.] Applicant's told law enforcement and the media that he and Neville had wanted to become serial killers and to kill one to five people a week. [RR 33: 48; State's Exhibit 86.] The customs service special agent who spoke to Applicant testified that, as Applicant

talked about killing Robinson, he "kind of went into like a zone. . . . his eyes g[o]t a little bit wider. He became very excited, almost aroused." [RR 33: 50.] Applicant told the agent that he and Neville both wanted to kill Robinson and to be serial killers and that he expected the death penalty for this crime. [RR 33: 53-54.]

G. Information gleaned from Applicant's school career provides information relevant to determining Applicant's adaptive behavior.

1. Although Applicant was placed in special education classes in school, he was classified as having a learning disability, not mental retardation. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 9; Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 2; RR 34: 47.]

2. While Applicant's academic achievement was poor, he was rated as not having significant deficits in adaptive behaviors while he was a public school student. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 9; Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 2.]

3. Many teachers found Applicant to be a lazy student. [RR 34: 31.]

4. Applicant's school records show that in ninth grade his adaptive behavior was assessed using "informal measures." [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, Attachment B at 11.] His adaptive behavior was reported to be consistent with his intellectual functioning "with no significant deficits in either area." [*Id.*] Although Applicant met the eligibility requirements for learning disability, a notation under the recommendation section stated that Applicant's "disability does not appear to significantly interfere with his ability to meet regular mastery standards [and that he could] be expected to meet the districts regular criteria for receiving passing grades and maintaining extracurricular activities." [*Id.*]

5. According to school records, Applicant's failure in various classes during tenth grade was always reported to be the result of noncompletion of assignments, inattentiveness, student apathy, low test scores, and/or not attending tutorials. [*Id.*]

6. Although Applicant was in special education classes due to a learning disability, he showed up for class, followed the rules of school society,

could begin tasks on his own if he was interested in something, and could complete tasks if he wanted to. [RR 33: 291-96; 34: 30-31, 39, 55.]

7. According to Applicant's shop teacher, Applicant had no trouble verbalizing understandable responses when he wanted to reply to something. [RR 33: 300-02.] Although Applicant took longer than other special education students in his shop class to make a baseball hat holder, Applicant was not always in the mood to do the work and it took a long time to motivate him. [RR 33: 277-78.] Applicant had trouble on a project involving a flower cart, but he completed the project in a normal amount of time because he wanted to move on to another project. [RR 33: 281.] After that, every task was a little simpler for Applicant. [RR 33: 284.] Applicant's shop teacher was pleased with Applicant's progress because some special education students never complete a project. [RR 33: 299.]

8. Applicant's math teacher found Applicant hard to motivate, and the only way to get him to accomplish tasks was to work with him one-on-one. [RR 34: 64-65.] Applicant completed some assignments, but he was sometimes lazy and slept in class.

[RR 34: 73-74.] Applicant "pretty well just sat out" and would ask why he should do the work because his father did not care and the teachers had to pass him. [RR 34: 71.]

H. Dr. Cunningham, the psychologist who testified on behalf of the defense at trial, interviewed and evaluated Applicant in jail.

1. Applicant said that he was reading Stephen King novel, a Dean Koontz novel, and the Bible. [RR 35: 86.] On February 2, 2002, Applicant wrote a jail request for Stephen King novels or whatever else he could get, stating that he hoped it would be something he had not yet read. [RR 35: 87; State's Exhibit 90.]

2. Jail requests written by Applicant are consistent with his level of adaptation and intelligence. [RR 35: 87-91.] The Court finds that any spelling or grammatical errors contained in the requests are consistent with Applicant's learning disability and poor academic achievement.

3. The examiner's manual for the American Association on Mental Retardation Adaptive Rating Scale (ABS), which was used by Dr. Cunningham, does not reveal a single 20-year-old on trial for capital murder

in the normative sample. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 9.] Furthermore, there is no evidence for the use of the ABS-S.2 by informants asked to retrospectively rate the adaptive behavior of a child who was in their class four to six years earlier, especially when they had the child for only one class a semester, which typically limits the opportunity to observe adaptive behaviors. [*Id.*]

4. The adaptive behavior ratings of persons such as Chris Bybee and Cheryl Conner, relied on by Dr. Cunningham, are "reconstructed memories and retrospective guesses about what [Applicant] possibly was unable to do 4-6 years earlier and under the potentially bias[ed] nature of the `high stakes' situation of a capital murder trial." [*Id.*]

5. Dr. Cunningham's assessment of adaptive behavior using informants who retrospectively rated Applicant during a period four to six years earlier "is poor information upon which to base such an important decision." [*Id.*]

I. Applicant's records from Mental Health Mental Retardation of Tarrant County do

not support a finding that Applicant is deficient in his adaptive behavior.

1. When Applicant arrived at the Tarrant County Jail on March 7, 1998, he stated that he previously had attempted suicide by cutting his left wrist. [Tarrant County Sheriff's Department Detention Bureau Report dated 3-7-98; Tarrant County Jail Mental Health Services Request dated 3-7-98.] However, no open wounds or scars were observed. [*Id.*] The Tarrant County Jail Mental Health Services Request dated March 7, 1998, indicates that there was a "[m]arked discrepancy between reported symptoms and objective facts," that "[i]nmate is inconsistent in subsequent descriptions of symptoms," and that "[i]nmate possibly seeking to benefit his/her legal case." [Tarrant County Jail Mental Health Services Request dated 3-7-98.]

2. On May 26, 1998, Applicant called on the emergency intercom complaining of a strange noise. [Tarrant County Sheriff's Department Detention Bureau Report dated 5-26-98.] The responding guard informed Applicant that the noise was caused by the regular operations of the jail facility. [*Id.*] When MHMR evaluated

Applicant in connection with this matter, Applicant complained of boredom, being stressed, having no one to talk to, and having other inmates harassing him. [Tarrant County Jail Mental Health Services Request dated 5-26-98.] The request indicates "[i]nmate possibly drug seeking" and "[i]nmate possibly seeking to benefit his/her legal case." [*Id.*] The recommendation was that there was "[n]o need for a psych follow-up." [*Id.*]

3. On June 9, 1999, a mental health services request was completed because Applicant "appeared extremely angry," was talking to what appeared to be no one, and made swinging motions as if striking someone. [Tarrant County Jail Mental Health Services Request dated 6-9-99.] The progress notes from his MHMR evaluation on July 2, 1999, state that Applicant complained of trouble with concentration, being extremely anxious about his case, hearing voices, and being concerned about his family's safety. [*Id.*] The recommendation was that Applicant be referred to a psychiatrist for evaluation. [*Id.*] After a consultation on July 6, 1999, with a staff psychiatrist, it was determined that

Applicant's problems "were related more to being in administrative segregation, than issues of chronic severe mental illness." [Progress Notes — Therapist dated 2-17-00.]

J. Applicant's medical records from the Texas Department of Criminal Justice contain nothing to indicate that Applicant has deficient adaptive skills or is mentally retarded.

K. Although Applicant is slow, he cannot be compared to a child between the ages of eight and ten because his behaviors, emotions, and interactions are not comparable. [RR 35: 212.]

1. Comparing chronological age to mental age is controversial, [RR 35: 211], and is not an accepted practice in psychology. [Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 3.]

2. Applying mental age to adults ignores their experiences and best describes them from an academic-potential point of view. [RR 35: 212.]

3. While the use of developmental scores, such as mental age, may have some use in the assessment of children, the procedures do not apply to adults and should not be used. [Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 3.] Ability

levels are best described in terms of relative scores, such as percentiles. [*Id.*]

4. Applicant did not act like an eight, nine, or ten year old when Dr. Price interviewed and evaluated him. [RR 35: 212.]

L. Any head injuries suffered by Applicant as a child have little significance to determining whether Applicant is mentally retarded. [RR 35: 219.]

1. Dr. Price did not find persuasive the materials relied on by Dr. Cunningham to show the possibility that Applicant suffered brain injury because Applicant's head injuries were not sufficiently serious. [RR 35: 219.]

2. On cross-examination during trial, Dr. Cunningham acknowledged that, of all the head injuries reported to him by Applicant's family, the only documented injury was Applicant falling and having his nose lacerated. [RR 35: 104.]

3. There are no independent medical records pointing to physical findings, and Dr. Cunningham could not report that Applicant ever suffered a concussion other than what Applicant's family said after he was

charged with capital murder. [RR 35: 104-05.]

4. Dr. Cunningham testified that Applicant's injuries were only a small part of his evaluation. [RR. 35: 105, 148.]

M. Dr. Price saw absolutely no signs or symptoms in Applicant to suggest any genetic disorders such as Fetal Alcohol Syndrome, Fetal Alcohol Effect, Kleinfelter Syndrome, Extra Y Chromosome, or Fragile X Syndrome. [Affidavit of Jack Randall Price, Ph.D., dated 4-9-02, at p. 3.]

N. Tamara Campbell, who supervised Applicant in his job at the Kroger grocery store, found Applicant to be lazy, not mentally retarded. [RR 31: 209-11.] Applicant trained Alan Boles as a Kroger grocery store courtesy clerk, teaching Boles how to properly sack groceries, to not put chemicals and cleaning supplies with groceries, and to double-bag heavy things. [RR 35: 272-73.] Boles, who now works with mentally challenged children, worked with Applicant at Kroger three or four days a week for six or seven months and never noticed anything slow about Applicant. [RR 35: 270, 274.]

O. Applicant failed a computer test for a driver's license, but he passed a written driver's license test. [RR 33: 116.]

Applicant's mother was in the process of teaching Applicant to drive at the time Neville "come [sic] along and got him," so Applicant never took the driving test portion of the test. [*Id.*]

P. While in Tarrant County Jail awaiting trial, Applicant discussed the Bible, knew who Christ was, realized he could be saved and forgiven, knew he wanted to be in heaven instead of hell, realized he needed forgiveness, and understood there were consequences for the things he had done. [RR 35: 179.] Other inmates referred to Applicant as a "blessing" because they would pray and read the Bible together and Applicant would minister to them and help with their problems. [RR 35: 173.]

Q. On February 17, 1998, while on the run to Mexico after Robinson's murder, Applicant and Neville stopped in a restaurant, where Monica Zepeda was their waitress. [RR 35: 280-82.] Applicant wore black jeans, big heavy biker boots, a big black leather jacket, long hair, and silver rings of "skulls and snakes and stuff." [RR 35: 283.] Applicant appeared to read the menu and independently ordered something for himself that was different from Neville's order. [RR 35: 283-85.] Applicant used proper eating etiquette. [RR 35: 287.] Applicant and Neville both laughed and had a good time, both initiated

conversation with Zepeda, and both tried to coax Zepeda to their motel room. [RR 35: 285-86, 288.] Applicant asked Zepeda for a date. [RR 35: 290.]

R. Arlington detective Richard Nutt took Applicant's written statement after his arrest in Eagle Pass, Texas. [RR 35: 296-310; State's Exhibit 84.] The detective read Applicant his rights, and Applicant looked the detective in the eye after each warning and said that he understood. [RR 35: 302-04.] Applicant read a section of the statement out loud to Detective Nutt. [RR 35: 309.]

S. With regard to affidavits submitted by Applicant in this proceeding, the Court finds:

1. Lilli C. Hallam, project coordinator for 'The Arc of Dallas' Mental Retardation and Justice Information Initiative, discusses only general principles regarding mental retardation and provides no useful information in evaluating Applicant's particular case. [*See generally* Affidavit of Lilli C. Hallam.]

2. Stephen Dollar taught Applicant World History during the 1995-96 school year when Applicant was a sophomore. [Affidavit of Stephen Dollar at p. 1-2.] Dollar's statements

regarding Applicant's adaptive behavior, like the statements of informants relied on by Dr. Cunningham, are "reconstructed memories" and "retrospective guesses" about what Applicant possibly was unable to do five to six years earlier and are made "under the potentially bias[ed] nature of the `high stakes' situation" after Applicant was sentenced to death. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 9.] Such observations offer "poor information" on which to judge Applicant's level of adaptive skills or to base a determination of mental retardation. [*Id.*] Moreover, Dollar's observations are inconsistent with other overall evidence of Applicant's adaptive behavior as set forth in the above findings of fact by the Court.

3. The affidavits from Applicant's trial attorneys, defense investigators, and a fellow death-row inmate are contradicted by other evidence of Applicant's abilities to communicate, comprehend, and function in his daily life, as set forth above in the Court's findings of fact and are based on observations by persons with a favorable bias toward Applicant. [Affidavit of William S. Harris, dated 9-20-02; Affidavit of William S.

Harris, dated 1-15-02; Affidavit of Paul A. Connor, Affidavit of Joseph D. Ward; Affidavit of John Ladd; Affidavit of Bill Coble.]

VII. The final requirement for a finding of mental retardation is that the condition "originates during the developmental period." TEX. HEALTH & SAFETY CODE ANN. § 591.003(13). This means that the mental retardation must have manifested itself before age eighteen. [Affidavit of Jack Randall Price, dated 4-9-02, at 2.] *See Atkins*, 122 S. Ct. at 2245 n.3.

A. Applicant was eighteen years old when he participated in Robinson's murder.

B. As set forth above, Applicant's IQ scores and/or adaptive behavior do not clearly place him within the definition of mental retardation. [Affidavit of Jack Randall Price, Ph.D., dated 10-5-02, at p. 10.]

Conclusion of Law — Ground for Relief Number One: Based upon the following conclusions, the Court recommends that Applicant's first ground for relief be denied:

I. Applicant cannot be classified as mentally retarded because he fails to meet all three criteria of the definition set forth in TEX. HEALTH & SAFETY CODE ANN. § 591.003(13). *See Stevenson*, 73 S.W.3d at 914-17; *Ex parte Tennard*, 960 S.W.2d at 61. Therefore, Applicant does not fall within the classification of mentally retarded capital offenders who are

exempt from the death penalty under *Atkins*, 122 S. Ct. at 2244-52.

II. Alternatively, even if Applicant falls within the upper range of mild mental retardation, he is not so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus regarding exemption from the death penalty. *See Atkins*, 122 S. Ct. at 2550 (recognizing that not all people claiming mental retardation will be "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus").

Findings of Fact — Ground for Relief Number Two: Applicant complains that his Fourteenth Amendment due process rights as interpreted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), were violated because the death penalty statute implicitly put the burden to prove mitigation on him rather than requiring the State to prove lack of mitigation beyond a reasonable doubt and because the indictment failed to notify him of the facts the State intended to prove in order to establish his statutory qualification for the death penalty. [*See* Application at 16-21.]

1. The Court's jury charge at the punishment phase of the trial contained the statutory mitigation special issue. [CR 3: 234.] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (mitigation special issue).

II. A finding of mitigation decreases, not increases, the available punishment range for capital murder.

III. The jury's finding regarding lack of mitigation did not expose Applicant to a deprivation of liberty greater than that authorized by the verdict according to statute. *See* TEX. PENAL CODE ANN. § 12.31(a) (individual adjudged guilty of a capital felony in a case in which the State seeks the death penalty shall be punished by imprisonment for life or by death). Applicant's capital murder conviction exposed him to the death penalty, *see id.*, and the mitigation issue was akin to a sentencing factor that guided the determination of which sentence to impose without increasing the statutory maximum for the charged offense of capital murder.

IV. The jury, not the Court, made all decisions necessary to impose the death penalty in this case.

V. Texas' mitigation special issue does not place an express burden on either party regarding mitigation.

Conclusions of Law — Ground for Relief Number Two:

Based upon the following conclusions, the Court recommends that Applicant's second ground for relief be denied:

I. The statutory mitigation instruction did not give Applicant the burden on an issue that could

increase his punishment; rather it gave Applicant an opportunity to *decrease* the applicable punishment to the statutory minimum of life imprisonment. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g); *see also* TEX. PENAL CODE ANN. § 12.31(a) (individual adjudged guilty of a capital felony in a case in which the State seeks the death penalty shall be punished by imprisonment for life or by death). Because the mitigation special issue did not increase the penalty for capital murder, and because the jury made all of the findings necessary to impose Applicant's death sentence, Applicant's Fourteenth Amendment due process rights as interpreted by *Apprendi*, 530 U.S. at 468-97, and *Ring v. Arizona*, 122 S. Ct. 2428, 2432-43 (2002), were not violated. Both *Apprendi* and *Ring* apply only to the determination of facts upon which the legislature conditions an increase in the maximum statutory punishment authorized by the guilty verdict. *See Harris v. United States*, 122 S. Ct. 2406, 2414-20 (2002) (*Apprendi* inapplicable to facts increasing minimum sentence); *United States v. Barton*, 257 F.3d 433, 441 (5th Cir. 2001) (*Apprendi* not applicable to factual element increasing mandatory minimum sentence), cert. denied, 534 U.S. 1105 (2002); *United States v. Spiller*, 261 F.3d 683, 692 (7th Cir. 2001) (*Apprendi* not applicable to drug quantity finding where sentence was less than statutory maximum); *United States v. Garcia*, 252 F.3d 838, 842-44 (6th Cir. 2001) (*Apprendi* not offended by excess

drug quantity finding where sentence was below statutory maximum).

II. Neither *Apprendi* nor *Ring* trump *Walton v. Arizona*, 497 U.S. 639 (1990), to require the State to bear the burden of proof on all punishment issues regardless of whether they increase the maximum statutory sentence. While *Ring* overruled *Walton* to the extent it allowed a sentencing judge alone to find aggravating circumstances necessary for the imposition of the death penalty, the decision did not address *Walton's* discussion regarding placement of the burden of proof on mitigation. *See Ring*, 122 S. Ct. at 2443. The *Apprendi* decision itself appears to recognize that its jury and burden-of-proof requirements are inapplicable where mitigating facts are concerned because such facts do not expose the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute. *See Apprendi*, 530 U.S. at 490 n.16; *see also Ring*, 122 S. Ct. at 2437 n.4 (citing *Apprendi's* recognition of the distinction between aggravating and mitigating facts). Accordingly, the State was not required to bear the burden to prove a lack of mitigating circumstances. *See Walton*, 497 U.S. at 650 (declining to constitutionally require a state to negate a defendant's claimed mitigating circumstances).

III. The State was not required to notify Applicant of the facts it intended to prove in order to

establish his statutory qualification for the death penalty because the mitigation special issue is akin to a sentencing factor that guides determination of which sentence to impose without increasing the statutory maximum for the charged offense of capital murder. *See Apprendi*, 530 U.S. at 494 n.19 (term "sentencing factor" is not devoid of meaning — the term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense); *see also* TEX. PENAL CODE ANN. § 12.31(a) (individual adjudged guilty of a capital felony in a case in which the State seeks the death penalty shall be punished by imprisonment for life or by death). The facts establishing lack of mitigation do not increase the maximum statutory punishment authorized by a conviction for capital murder; therefore, they are not elements of the offense as opposed to mere sentencing factors under *Apprendi*.

Findings of Fact — Ground for Relief Number Three: Applicant argues that his rights to due process, to counsel, and against self-incrimination were violated by the admission at his trial of the videotaped interview he gave to media reporters. [*See* Application at 21-23.] He claims that his statements to the media were obtained with the assistance of law enforcement personnel in the absence of counsel or a knowing and intelligent waiver of counsel and because he is mentally retarded and incapable of

making an intelligent decision whether to talk to the reporters. [*See id.*]

I. Applicant's complaints about the deprivation of counsel and the absence of a waiver of counsel mirror his arguments that were rejected on direct appeal. *See Hall*, 67 S.W.3d at 274-75 (vacated on other grounds involving *Atkins*).

II. Applicant's claim that the videotape was inadmissible because his mental retardation rendered him incapable of making an intelligent decision as to whether to talk to the reporters could have been, but was not, raised on direct appeal.

III. Applicant's complaints involve the admissibility of evidence at his trial. [*See* Application at 21-23.]

Conclusion of Law — Ground for Relief Number Three:

Based upon the following conclusions, the Court recommends that Applicant's third ground for relief be denied:

I. Applicant's complaint about the deprivation of counsel and the absence of a waiver. of counsel is not cognizable because it was raised and rejected on direct appeal. *See Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998); *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).

II. Applicant's complaint that the videotape was inadmissible because his mental retardation

rendered him incapable of making an intelligent decision about whether to talk to reporters is not cognizable because he could have raised this complaint on direct appeal. *See Ex parte Gardner*, 959 S.W.2d 189, 199-200 (Tex. Crim. App. 1996) (op. on reh'g); *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996).

III. Alternatively, Applicant's complaint, which involves the admissibility of evidence at is trial, is not cognizable in this habeas proceeding. *See Ex parte Dutchover*, 779 S.W.2d 76, 77-78 (Tex. Crim. App. 1989).

Findings of Fact – Ground for Relief Number Four:
Applicant argues that his due process right to be free from a wholly arbitrary deprivation of liberty and his Eighth Amendment right to be free from the arbitrary and capricious infliction of the death penalty were violated because the evidence at trial was legally insufficient to support the jury's answer to the future dangerousness special issue. [*See* Application at 24-26.]

I. Applicant's claim was raised and rejected on direct appeal. *See Hall*, 67 S.W.3d at 873-74 (vacated on other grounds involving *Atkins*).

II. Applicant's claim involves an attack on the legal sufficiency of the evidence to prove that he posed a future danger. [*See* Application at 24-26.]

Conclusions of Law — Ground for Relief Number Four:
Based upon the following conclusions, the Court

recommends that Applicant's fourth ground for relief be denied:

I. Applicant's complaint is not cognizable because it was raised and rejected on direct appeal. *See Ex parte Ramos*, 977 S.W.2d at 617; *Ex parte Acosta*, 672 S.W.2d at 472.

II. Alternatively, Applicant's challenge to the legal sufficiency of the evidence to support the jury's finding of future dangerousness is not available by way of a post-conviction collateral attack. *See Exparte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994).

Findings of Fact — Ground for Relief Five: Applicant claims that the death penalty statute allows the jury too much discretion to determine who should live and who should die and lacks the minimal standards and guidance necessary for the jury to avoid the arbitrary and capricious imposition of the death penalty. [*See* Application at 26-29.]

I. Applicant's complaint was raised and rejected on direct appeal. *See Hall*, 67 S.W.3d at 877 (vacated on other grounds involving *Atkins*).

II. Applicant offers no compelling reason to abandon consistent precedent from the Court of Criminal Appeals rejecting Applicant's position.

Conclusion of Law — Ground for Relief Five: Based upon the following conclusions, the Court recommends that Applicant's fifth ground for relief be denied:

I. Applicant's complaint is not cognizable because it was raised and rejected on direct appeal. *See Ex parte Ramos*, 977 S.W.2d at 617; *Ex parte Acosta*, 672 S .W.2d at 472.

II. Alternatively, Texas' death penalty statute does not allow the jury too much discretion to determine who should live and who should die and does not lack the minimal standards and guidance necessary for the jury to avoid the arbitrary and capricious imposition of the death penalty. *See Moore v. State*, 999 S.W.2d 385, 408 (Tex. Crim. App. 1999), *cert. denied*, 530 U.S. 1216 (2000); *Brooks v. State*, 990 S.W.2d 278, 288 (Tex. Crim. App.), *cert denied*, 528 U.S. 956 (1999); *Busby v. State*, 990 S.W.2d 263, 272 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1081 (2000); *Pondexter v. State*, 942 S.W.2d 577, 586-87 (Tex. Crim. App. 1996), *cert denied*, 522 U.S. 825 (1997).

Findings of Fact — Ground for Relief Six: Applicant argues that his Fourteenth Amendment right to due process and Eighth Amendment rights as interpreted in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), were violated because the mitigation special issue sent mixed signals to the jury by being unclear on the burden of proof, thereby rendering the verdict unreliable. [*See* Application at 29-32.]

I. Applicant's complaint that the mitigation special issue did not inform the jury that he had no burden of proof to obtain a "yes" answer to the mitigation special issue was raised and

rejected on direct appeal. *See Hall*, 67 S.W.3d at 877 (vacated on other grounds involving *Atkins*).

II. *Penry II* did not involve the statutory mitigation special issue given in Applicant's case, and its analysis of the judicially crafted supplemental issue in that case is of little assistance here. *See Penry II*, 532 U.S. at 789-90.

III. The statutory mitigation special issue contained in the Court's punishment charge in this case fully complied with the requirements of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*).

IV. The Texas Legislature has not assigned a burden of proof for the mitigation special issue.

Conclusions of Law — Ground for Relief Number Six: Based upon the following conclusions, the Court recommends that Applicant's sixth ground for relief be denied:

I. Applicant's complaint that the mitigation special issue did not inform the jury that he had no burden of proof to obtain a "yes" answer to the mitigation special issue is not cognizable because it was raised and rejected on direct appeal. *See Ex paste Ramos*, 977 S.W.2d at 617; *Ex paste Acosta*, 672 S.W.2d at 472.

II. Alternatively, the mitigation issue is not unconstitutional for failing to assign burdens of proof as to mitigating evidence. *See Eldridge v. State*, 940 S.W.2d 646, 654 (Tex. Crim. App. 1996). The burden of proof regarding mitigation

is implicitly placed upon the defendant to produce evidence and to persuade the jury that circumstances exist which mitigate against the imposition of death in his case. *See Lawton v. State*, 913 S.W.2d 542, 557 (Tex. Crim. App. 1995). There is no constitutional requirement that the burden of proof regarding mitigating evidence be placed on either party, and, to the extent that the burden is placed on the defendant, it is not unconstitutional to so place the burden. *See id.; see also Walton*, 497 U.S. at 649-51. While *Ring* overruled *Walton* to the extent it allowed a sentencing judge alone to find aggravating circumstances necessary for the imposition of the death penalty, the decision did not address *Walton's* discussion regarding placement of the burden of proof on mitigation. *See Ring*, 122 S. Ct. at 2443.

III. Alternatively, the legislature's failure to assign clear burdens of production and proof regarding mitigation does not create the type of constitutional uncertainty in our capital punishment scheme condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). *See Medina v. State*, 7 S.W.3d 633, 644 (Tex. Crim. App. 1999), *cert denied*, 529 U.S. 1102 (2000); *Eldridge*, 940 S.W.2d at 654; *Lawton*, 913 S.W.2d at 558. *Furman* dealt with the untrammeled discretion to impose the death sentence, but the untrammeled discretion to afford life to a death eligible defendant does not offend the United States Constitution. *See Lawton*, 913 S.W.2d at 558. The failure to define a burden of production

and persuasion regarding the mitigation special issue does not render it or the capital punishment scheme unconstitutional, *See id.*

WHEREFORE, PREMISES CONSIDERED, the State prays that the Court adopt the State's Proposed Memorandum, Findings of Fact, and Conclusions of Law.

Respectfully submitted,

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Chief of the Appellate Division

Appendix I

Court of Criminal Appeals of Texas.
Michael Wayne HALL, Appellant,
v.
The STATE of Texas.
No. 73,787.

Jan. 16, 2002.
Rehearing Denied March 13, 2002.

OPINION

KEASLER, J., delivered the opinion of the Court joined by KELLER, P.J., and MEYERS, WOMACK, HERVEY, and COCHRAN, J.J.

Michael Hall was convicted of capital murder and sentenced to death.[1] Direct appeal to this Court is automatic.[2] Hall raises thirteen points of error including a challenge to the sufficiency of the evidence supporting the jury's finding on the article 37.071 section 2(b) punishment issue.[3] We find Hall's claims meritless and affirm the judgment of the trial court.

STATEMENT OF FACTS

Eighteen-year-old Hall and his friend Robert Neville

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[1] TEX. PENAL CODE ANN. § 19.03(a); TEX.CODE CRIM. PROC. art. 37.071, § 2(g). Unless otherwise indicated all references to Articles refer to the Code of Criminal Procedure.
[2] Art. 37.071, § 2(h).
[3] *See* Art. 37.071, § 2(b).

decided to kill someone because Hall was angry that he had a "sucky-ass" life. They started searching for the right victim and preparing for their crime by obtaining rifles, pellet guns, a crossbow, and ammunition. After much looking, Hall and Neville finally chose nineteen-year-old Amy Robinson, a friend and former coworker, because she trusted them and they "didn't have to put bruises on her to get her in the car." The evidence also revealed that Amy had a genetic disorder that made her small and mentally and physically slow. She stood four feet five inches tall and had the mental capacity of a third or fourth grader.

On February 15, 1998, Hall and Neville went looking for Amy in order to carry out their murderous plan. They checked her schedule at the Kroger grocery store and then lay in wait for her to ride by on her bicycle on her way to work. When the pair saw Amy, they coaxed her into the car, promising to drop her at work after they circled around in the country. As Neville drove, Amy complained that she did not want to be late for work.

Neville then pretended to have a flat tire and pulled the car over on a dirt road by a remote field. Hall and Neville got out of the car and walked into the field carrying their weapons while an unsuspecting Amy waited in the car listening to the radio. At some point, Hall persuaded Amy to get out of the car, telling her she needed to go talk to Neville near a tree. As Amy walked toward Neville, he fired a crossbow at her several times. Neville missed each shot, but Amy became angry when the last arrow

grazed her hair. When Amy started walking back to the car, Hall shot her in the back of her leg with his pellet gun. Hall and Neville laughed while Amy cried in pain.

Meanwhile, Neville returned to the car and got his .22 caliber rifle. When Hall managed to maneuver Amy back into the field, Neville shot her in the chest. Hall then shot her in the chest "three or four or six times" with the pellet gun. Amy fell to the ground making loud noises and shaking. Hall then stood over her and stared for five to ten minutes. The pair worried that someone would hear Amy, so Neville shot her in the head, killing her instantly. Hall and Neville then left Amy and her bicycle in an area where they would not be easily discovered.

A few days later, they returned to the scene. Neville fired shots into Amy's dead body, and Hall took keys and money from her pocket. When Amy's family and coworkers realized she was missing, a massive search ensued. More than two weeks later, authorities focused on Hall and Neville. Fearing they would be caught, the pair fled Arlington but were soon arrested when they attempted to cross the border into Mexico. The authorities found Amy's body on the day of the arrest.

SUFFICIENCY OF THE EVIDENCE AT PUNISHMENT

In his sixth point of error, Hall claims that the evidence presented at trial was legally insufficient to support the jury's finding that he would be a

continuing threat to society.[4] In reviewing the sufficiency of the evidence at punishment, we look at the evidence in the light most favorable to the verdict. We determine whether any rational trier of fact could have believed beyond a reasonable doubt that Hall would probably commit criminal acts of violence constituting a continuing threat to society.[5] The facts of the crime alone can be sufficient to support the affirmative finding to the special issue.[6] Additionally, we have consistently defined "society" as encompassing both the prison population and the free population.[7]

The facts of this case support the jury's affirmative finding that Hall would continue to be a threat. The evidence did not show a hastily conceived murder plan, but a methodical, premeditated scheme. In addition, once Hall and Neville had made their plans and chosen their mentally challenged victim, they taunted and tormented her, reveling in her confusion and agony. Finally, Hall boasted in his media interview that he was the one who got Amy to trust him, and she would have escaped had Neville tried to commit the offense without him. Indeed, Hall told the media that he had no remorse for Amy's death.

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[4] *See* Art. 37.071, § 2(b)(1).

[5] *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Allridge v. State*, 850 S.W.2d 471 (Tex.Crim.App.1991), *cert. denied*, 510 U.S. 831, 114 S. Ct. 101, 126 L. Ed. 2d 68 (1993).

[6] *Allridge*, 850 S.W.2d at 488.

[7] *See Griffith v. State*, 983 S.W.2d 282, 288 n.9 (Tex. Crim. App. 1998), *cert. denied*, 528 U.S. 826, 120 S. Ct. [illegible], 145 L. Ed. 2d 65 (1999).

When asked how he felt about Amy dying the way she did, Hall snickered, "Well, I wouldn't want to be in her place. She had to take a lot of pain." After his arrest, Hall told law enforcement and the media that he and Neville had wanted to become serial killers and kill one to five people a week. They also wanted to become white supremacists and kill African Americans.

In addition to the facts of the crime and the circumstances surrounding Hall's arrest, the State presented evidence that Hall told one of his teachers about violent fantasies he had about injuring others. Hall also admitted to the defense psychologist that he had violent, demonic, bloody dreams, which the psychologist testified was common for potential killers. The State's psychologist testified that there was no indication that Neville had duped Hall into committing this crime.

A rational jury could reasonably have concluded that Hall would continue to be a threat to society, given the facts of the case and the psychological evidence. Accordingly, we hold the evidence legally sufficient to support the jury's affirmative answer to the future dangerousness issue. Point of error six is overruled.

ADMISSION OF VIDEOTAPED STATEMENT

In his first five points of error, Hall claims that the trial court erred in admitting into evidence a videotaped statement he gave to reporters. Specifically, in his first two points of error, Hall complains that the admission of this statement

violated both due process and the effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, sections 10, 14, 19, and 29 of the Texas Constitution.

Hall offers no reason for construing the Texas Constitution as conferring greater protection in this area of law than the federal constitution. Therefore, we will not address his state constitutional arguments.[8] Hall also fails to distinguish between his rights under the Fifth Amendment and those under the Sixth Amendment. So, we will assume that Hall had been formally charged at the time of the media interview, and we will combine our analysis of these points.

In *Maine v. Moulton*,[9] the United States Supreme Court re-emphasized that after the initiation of formal charges, the Sixth Amendment guarantees the accused the right to rely on counsel as a "medium" between the State and the accused. This guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a

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[8] *See Muniz v. State*, 851 S.W.2d 238, 251-52 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 837, 114 S. Ct. 116, 126 L. Ed. 2d 82 (1993); *Heitman v. State*, 815 S.W.2d 681, 690-91 n.23 (Tex. Crim. App. 1991).

[9] 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985).

state agent.[10]

During a pre-trial hearing on a motion to suppress the complained-of statement, the television reporter who conducted the interview testified that she and a television photographer went to the sheriff's office early that morning and talked to deputies about her desire to interview Hall and his co-defendant. The sheriff was not in the office at the time so they were told to come back later. When the two returned shortly before lunch, the sheriff informed the reporter that her request would be presented to Hall and Neville and that she should check back later. A Fort Worth newspaper reporter and a newspaper photographer were also at the sheriff's office at that time and made a similar request to interview the suspects.

When the television reporter and photographer returned to the office, a deputy came out holding a note which he indicated was a signed consent to the reporter's request for an interview. But, the reporter stated that she had not written such a note. Upon request, she then wrote a note to the suspects with her request for an interview. A deputy took it to them and told them that they could sign the request or not. Both signed. It is not clear who generated the first written request.

The two reporters and the two photographers were directed to an interview room with a counter and fencing separating them from the suspects' seating

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[10] *Id.*

area. Neville and Hall were then interviewed separately. Both reporters testified at the hearing that no authority ever suggested that they conduct the interview, nor did authorities suggest any questions for them to ask the suspects. Both reporters also testified that they did not provide authorities with copies of their resulting interviews.

We find no evidence that the authorities prompted the interview. We conclude that the reporters were not acting as state agents when they conducted the interviews and Hall's rights were not violated when the evidence was presented at trial. Points of error one and two are overruled.

In his third point, Hall argues that the trial court erred in admitting the videotape because it showed him in "a cage" and therefore, "reversed his right to be presumed innocent" under the due process clause of the federal and state constitutions. But Hall did not object on this basis at trial. To preserve a complaint for appellate review, the record must show that the complaint was made to the trial court.[11] Here, it does not. Hall's third point of error is overruled.

Hall claims in point four that the prejudicial effect of the tape "clearly outweighed" any probative value the tape might have had in violation of Texas Rules of Evidence 401 and 403. The trial court has broad discretion in conducting a Rule 403 balancing test, and we will not lightly disturb the decision

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[11] TEX. R. APP. P. 33.1.

rendered.[12]

In this case, the videotape's probative value was that it allowed the jury to see Hall's behavior and hear his rendition of the facts of the offense firsthand. These are also the factors which make the evidence prejudicial. But we find that the videotape simply reflects the reality of the crime comm tted and Hall's lack of remorse. In short, the prejudicial effect of this evidence comes from nothing more than what Hall himself has done. He cannot successfully say, "You must not be outraged by my outrageous behavior."

For otherwise relevant evidence to be excluded under Texas Rule of Evidence 403, the record must show that the danger of unfair prejudice substantially outweighs the probative value of the complained-of evidence. This videotape, though prejudicial, was not unfairly so. The trial judge did not abuse his discretion in overruling Hall's objection. Point of error four is overruled.

Finally on this issue, Hall complains that a duplicate version of his videotaped statement that had been edited by the Tarrant County District Attorney's office was not properly authenticated under Texas Rule of Evidence 1003. The Rule provides that a duplicate is admissible to the same extent as an original unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the

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[12] *See, e.g., Moreno v. State*, 22 S.W.3d 482, 489 (Tex. Crim. App. 1999).

original.

Hall argues that the edited copy of the tape had been created in a manner that was "orchestrated for the greatest theatrical effect" and that the questions and the order of the answers from the original tape were changed. The edited version of the tape was admitted into evidence at the guilt-innocence phase of the trial, while an unedited version of the tape was admitted into evidence at punishment.

During the pre-trial suppression hearing, the television reporter stated that she watched the entire taped interview as it was being duplicated. She testified that the unedited duplicate tape accurately reflected her memory of the interview with Hall which she had personally conducted. The television reporter also stated that she had watched the edited tape, and except for some portions of the interview being deleted and other portions being rearranged, it also accurately reflected the events of the interview. Although the newspaper reporter had not participated in the copying or editing of the videotape, he also testified that both tapes accurately reflected what had occurred during the live interview.

After viewing both tapes, we find no evidence that Hall's statements were taken out of context or substantially altered in the edited version. The only portions of Hall's interview excluded from the edited tape concerned information about his family, his future plans with Neville, and statements about an extraneous bad act. Much of this information would

have been inadmissible at the guilt-innocence stage of the trial. Furthermore, Hall never attempted to admit the remainder of the tape into evidence under Rule 106.[13] The judge did not abuse his discretion in admitting the tapes.[14] Point of error five is overruled.

CONSTITUTIONALITY OF DEATH PENALTY AND ARTICLE 37.071

In his seventh through thirteenth points of error, Hall complains that Article 37.071 is unconstitutional or operates unconstitutionally as to him for a variety of reasons. Specifically, Hall asserts in his seventh point of error that Article 37.071 gives the jury too much discretion and insufficient guidance "to avoid the improperly capricious imposition of the death penalty." This Court has consistently decided this issue adversely to Hall's position.[15] Point of error seven is overruled.

In points ten through thirteen, Hall argues that the mitigation question included in the death penalty statute unconstitutionally limited the jury's consideration of the mitigating evidence and otherwise failed to adequately guide the jury in

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[13] *See* TEX.R. EVID. 106.

[14] TEX. R. EVID. 1003; *see also Ladd v. State*, 3 S.W.3d 547, 571 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070, 120 S. Ct. 1680, 146 L. Ed. 2d 487 (2000).

[15] *See, e.g., Raby v. State*, 970 S.W.2d 1, 7 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1003, 119 S. Ct. 515, 142 L. Ed. 2d 427 (1998); *Pondexter v. State*, 942 S.W.2d 577, 586-87 (Tex. Crim. App.1996), *cert. denied*, 522 U.S. 825, 118 S. Ct. 85, 139 L. Ed. 2d 42 (1997).

considering the evidence.[16] This question is a statutory codification of the dictates handed down by the United States Supreme Court in *Penry v. Lynaugh.*[17] We have previously held this provision to be constitutional, and Hall has presented no new arguments here.[18] Points of error ten through thirteen are overruled.

In his eighth and ninth points of error, Hall asserts that it is a violation of due process and cruel and unusual punishment to inflict the death penalty on the mentally retarded. In arguing these two points, Hall does not distinguish, nor does he provide authority distinguishing, between his due process rights and the prohibition against cruel and unusual punishment included in the Eighth Amendment. We will likewise answer the two issues together without distinction.[19]

We note that the United Supreme Court has granted certiorari twice this year on the issue of whether the Eighth Amendment prohibits the imposition of the death penalty of the mentally retarded. On September 25, 2001, the Supreme Court dismissed as improvidently granted the writ of certiorari granted in *McCarver v. North Carolina.*[20] The case of *Atkins v. Virginia* [21] is still pending.

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[16] *See* Art. 37.071, § 2(e).

[17] 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[18] *See Shannon v. State,* 942 S.W.2d 591, 598 (Tex. Crim. App. 1996).

[19] *See* TEX. R. APP. P. 38.1(h).

[20] 533 U.S. 975, 122 S. Ct. 22, 150 L. Ed. 2d 804 (2001).

[21] 533 U.S. 976, 122 S. Ct. 24, 150 L. Ed. 2d 805 (2001).

Hall argues that his cognitive abilities necessarily reduce his culpability to such a level that the assessment of death is a disproportionate punishment. In support of his point, Hall points out testimony from his own expert, clinical and forensic psychologist Dr. Mark Cunningham, who testified that Hall was mildly retarded and generally functioned at the level of an eight- to ten-year-old child. Hall then notes that Texas law does not allow the execution of children who are eight to ten chronological years old, and in fact, does not even prosecute children of that age. Thus, he argues, the law should not allow the execution of a person with the "mental age" of a child.

The United States Supreme Court answered this question in *Penry* when it addressed whether it is cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person "with Penry's reasoning ability."[22] The Supreme Court reasserted the principle that punishment should be directly related to the personal culpability of the criminal defendant, and defendants who commit criminal acts "that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[23] Indeed, the Court agreed that mental retardation has long been regarded as a factor that may diminish an

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[22] *Penry*, 492 U.S. at 313.

[23] *Penry*, 492 U.S. at 319.

individual's culpability for a criminal act.[24] However, the Court could not conclude that all mentally retarded people, by virtue of their mental retardation alone and apart from any individualized consideration of their personal responsibility, inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.[25] In other words, mentally retarded persons are individuals whose abilities and experiences can vary significantly. And, although retarded persons often have difficulty learning from experience, some are fully capable of learning, working, and living in their communities.[26] In light of these diverse capacities and life experiences, the Court concluded that it could not be said that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty.[27]

The principle set forth in *Penry* applies with equal force today. Although Hall presented evidence that he generally functions at the level of an eight to ten year-old child, the jurors were required to consider this evidence only in light of all of the evidence presented. So long as the sentencers could consider and give effect to mitigating evidence of mental retardation in imposing sentence, and make an individualized determination whether "death is the appropriate punishment" in this particular case, the

[24] *Id.* at 337.
[25] *Penry*, 492 U.S. at 338.
[26] *Id.*
[27] *Id.* at 338-39.

Eighth Amendment does not preclude the assessment of a death sentence.[28]

The jurors not only had Dr. Cunningham's assessment that Hall functioned as a child, but they also had his concession that Hall would be considered only "mildly retarded." Furthermore, the jury had the testimony of the State's expert, Dr. Randall Price, who was not convinced that Hall was retarded. Instead, Price testified that Hall could be mildly retarded, but he also might be of borderline intelligence. Price further noted that, in his professional opinion, Hall functioned more in the adolescent to young adult stage. Additionally, persons who had worked with Hall at Kroger testified that he did not appear mentally challenged-just lazy. Finally, the jury was able to observe Hall's behavior first-hand in the videotaped interview he gave the press.[29]

In light of this evidence, we cannot say that Hall's due process rights have been violated or that he has been subjected to cruel and unusual punishment. Points of error eight and nine are overruled.

We affirm the judgment of the trial court.

PRICE, JOHNSON and HOLCOMB, JJ. concurred in the result.

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[28] *See Penry*, 492 U.S. at 340.

[29] *See also Ex parte Tennard*, 960 S.W.2d 57, 60-63 (Tex. Crim. App. 1997), *cert. denied*, 524 U.S. 956, 118 S. Ct. 2376, 141 L. Ed. 2d 743 (1998).

Appendix J

FILED: April 1, 2010

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-70015

MICHAEL WAYNE HALL,

Petitioner - Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC

(Opinion 2/22/10, 5 Cir., _____, _____, F.3d _____)

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH Cm. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

REHG6A

Appendix K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL WAYNE HALL — CIVIL ACTION NO. 4:06-CV-436-A

VS.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION — December 10, 2008 9:15 a.m.

****

TRANSCRIPT OF PROCEEDINGS
(Trial Before the Court)

BEFORE THE HONORABLE JOHN H. McBRYDE
UNITED STATES DISTRICT JUDGE

* * * *

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* * * *

RANDALL PRICE,
having been duly sworn, testified as follows:
DIRECT EXAMINATION
BY MS. CALLAGHAN:
Q. Dr. Price, how many times have you testified in cases,

criminal cases?
A. Criminal cases in general?
Q. In capital cases.
A. In capital cases, in the last 22 years I have been involved in a number of cases. I've been involved in 232 total capital cases since 1986. I have testimony records for the last eleven years.
Q. Okay.
A. And I've testified 24 times in capital cases in the last eleven years.
Q. Okay. And can you tell us what percentage of the time you testified for the state and what percentage of the time you testified for the defense?

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A. In the last eleven years, 46 percent of the time for the defense and 54 percent of the time for the prosecution.
Q. I want to start by talking about the 2000 evaluation that you did on Michael Hall.
THE COURT: Let me interrupt a minute, as I did in Dr. Cunningham's, and maybe get a better focus on where we're going. One of the factors that enters into whether somebody is

considered to be mentally retarded is the measured IQ. Is that your understanding?
THE WITNESS: That's correct, sir.
THE COURT: Okay. And what, in your opinion, is the measured IQ of Michael Hall?
THE WITNESS: Well, I tested him personally about --
THE COURT: Let me just ask you this question: Do you have an opinion as to what his measured IQ is?
THE WITNESS: I do.
THE COURT: And what is it?
THE WITNESS: At this time 85.
THE COURT: Okay. And do you have an opinion as to what his measured IQ was when the crime in question was committed, and that was in 1998, February 15, 1998.
THE WITNESS: Approximately 67 to 72.
THE COURT: 67 to 72?
THE WITNESS: Yes, sir.
THE COURT: And why do you say "approximately"?

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THE WITNESS: Well, it was measured by Dr. Cunningham at trial stage at 67, and the last IQ prior to that had been nine years before. And I believe it was 72 at that time,

perhaps 71. But so that's the range at the time of the crime
that I think it was in.
THE COURT: Okay. And between the time of the crime
and the date of the criminal trial, which commenced in January
2000, do you have an opinion as to what his measured IQ was
during that time frame?
THE WITNESS: Well, I would say given the standard of
error, the best indication we have is 67.
THE COURT: The best what?
THE WITNESS: The best indication we have of his
measured IQ at the time of the crime is 67, plus or minus the
confidence interval.
THE COURT: Okay. That's at the time of the crime.
THE WITNESS: Yes, sir.
THE COURT: Okay. But you told me a minute ago it was
67 to 72. But you're changing that?
THE WITNESS: No, sir. That at trial stage it was
measured to be 67. Some nine years earlier it was measured to
be 71 or 72. So that is within -- those two scores are within
the confidence interval of each other, and so in that band of
scores that would represent his measured IQ at

the time of the
25 crime.

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1 THE COURT: Okay. And I'm trying to get you to tell
2 me what your opinion is as to what his measured IQ was at the
3 time of the crime.
4 THE WITNESS: Okay. 67 plus or minus five points.
5 THE COURT: Okay. And then what would be his measured
6 IQ between the time of the crime and the date of the trial as
7 I've described it?
8 THE WITNESS: I would say the same thing is the best
9 indication I have.
10 THE COURT: Okay. And then your opinion is that his
11 measured IQ is 85 now.
12 THE WITNESS: Yes, sir.
13 THE COURT: And does that give all of the opinions you
14 have relevant to the measured IQ of Mr. Hall at any point in
15 time? Have I fully covered it?
16 THE WITNESS: As far as the numbers go, yes.
17 THE COURT: Okay. Well, is there something else that
18 determines, in your opinion, general intellectual functioning
19 other than measured IQ?

THE WITNESS: No, sir.
THE COURT: Okay. Now, do you have an opinion as to whether Mr. Hall has any related limitations in adaptive functioning? And when I say "related," I assume that means related to the measured IQ level.
THE WITNESS: There is evidence that he had adaptive

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behavior deficits that in my opinion were related to both his low intelligence and his adjustment problems.
THE COURT: And what are you referring to as "adjustment problems"?
THE WITNESS: Well, as was testified to at trial stage by Dr. Cunningham, there were a lot of problems in his life, problems in his family, certainly problems in school that he had trouble coping with and adjusting to. So those were not all the result of his low intelligence. They were -- his problems were tied to his family home and failing in school, as well as, to low intelligence.
THE COURT: As well as to what?
THE WITNESS: As well as to his low intelligence.
THE COURT: Well, is there any way to define

what
15 adaptive function deficits are caused by low intelligence, and
16 specifically in reference to Mr. Hall, as opposed to the
17 environmental factors you mentioned?
18 THE WITNESS: I don't know a way to separate those.
19 THE COURT: From a scientific point, is there any way
20 to separate them?
21 THE WITNESS: I don't think so. I don't know of a way
22 and I have not found a way to do that.
23 THE COURT: Okay. And do you consider that Mr. Hall,
24 at this point in time, has deficit adaptive functions?
25 THE WITNESS: Well, in the environment he's in at this

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1 time there is very little that's required of him. We don't know
2 how to measure a person's ability to adapt to death row. It's
3 not the normal environment with a range of opportunities to do
4 things. He has adjusted quite well to prison and to death row,
5 but that's not to say that if he were in a different place that
6 there would not --
7 THE COURT: He's not in an environment where

it can be
measured.
THE WITNESS: That's correct.
THE COURT: Is that what you're telling me?
THE WITNESS: Yes, sir, that's correct.
THE COURT: Do you consider that he had adaptive
functioning deficits in the year 2000, 2001, and -- Well, let's
just say the years 1998 through the year 2000.
THE WITNESS: I would say the evidence is that he had
definite problems with adaptive behavior and general adjustment
to his environment, both home, school, and work, yes, sir.
THE COURT: And what you're saying is, there is no way
to tell what caused that.
THE WITNESS: Well, all of those things are causes,
and I don't know a way to separate them out.
THE COURT: Okay. Go ahead.
MS. CALLAGHAN: Thank you, Your Honor.
BY MS. CALLAGHAN:
Q. Dr. Price, do you think that the measured IQ of 67 that

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Michael has got on Dr. Cunningham's expert WAIS-III assessment
is an accurate reflection of his actual IQ?
A. Well, I think that it is difficult to tell. It's the best

-- that's the only one that we have close to the time of the crime. There were a lot of things going on in Mr. Hall's life, even at the time of the trial, that could have had an effect on his measured IQ, and that may have lowered it. In addition, we don't have a quantitative indication of the amount of effort that he put forth on that test, or his motivation.

Q. Let's talk about effort testing for a minute.

THE COURT: Let me interrupt a minute. That test was performed in what year?

THE WITNESS: In 2000 by Dr. Cunningham.

THE COURT: And that was before his criminal problems?

THE WITNESS: It was just before it. That test was performed in January of 2000, and I think his trial was in March of 2000.

THE COURT: If a defendant has the knowledge that a low intelligence level will help him in the defense of a case, does that have anything to do with motivation?

THE WITNESS: It can, yes, sir.

THE COURT: Can a person, in effect, rig the outcome of an IQ test?

THE WITNESS: Sure.

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THE COURT: Rig it down, is what I'm talking about.
THE WITNESS: Right.
THE COURT: I don't suppose there's any way to rig it up.
THE WITNESS: It's harder to score higher than you're capable of scoring. It's harder to be, even though a lot of us try, it's harder to be more intelligent than you actually are.
THE COURT: But you can make responses that would cause it to appear that you're less intelligent.
THE WITNESS: Sure.
THE COURT: Does that happen sometimes?
THE WITNESS: It does.
THE COURT: Have you had any experiences where that happens with people who are exposed to the death penalty?
THE WITNESS: I've been testing inmates, death row inmates, and defendants for 26 years; and I've noticed something that's really interesting. They tend to do that faking, that doing more poorly than they can, much more at trial stage than after they've been in prison on death row for years. It's been

a rare case indeed that I've had somebody try to rig the IQ
score, as you said, when I've gone to test them on death row.
It's been an interesting thing to observe how consistent that's
been, when at trial stage it happens sometimes.
THE COURT: Do you have any scientific explanation for
that?

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THE WITNESS: Well, I don't know if it's scientific.
It's certainly a theory that I have that at trial stage, of
course, everything is up in the air. They don't know what's
going to happen. They're scared. They're anxious a lot of
times or angry. And they just do that. Sometimes they try to
fake. They get to death row for a few years, and for a lot of
them all they really have is their self-respect. And they would
rather, to put it kind of crudely, they would rather be executed
than to look like they're dumb or in some way disturbed. They
try -- especially on cognitive tests that I've given them. I
can only think of one death row inmate that tried to score

poorly on purpose on tests that I've given them. And, you know,
I've tested hundreds.
THE COURT: Okay. Go ahead with your questioning.
MS. CALLAGHAN: Okay.
BY MS. CALLAGHAN:
Q. And you actually conducted what's called effort testing on
Michael?
A. I did.
Q. Can you tell us of the tests that you gave him, which ones
were effort tests?
A. Okay. There were three tests that I used to have a
quantitative indication of his effort and his level of
motivation. The first was the REY 15 Item. The second was the
dot counting test, and the third was the test of malingered

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memory.
Q. And are those standard tests that one would conduct when
doing a forensic evaluation of IQ?
A. Yes. All of them are, yes.
Q. Is it a customary practice to give effort testing?
A. Yes, it is, in cognitive testing to do as many as you can,
or at least one toward the start of the

evaluation, one toward
8 the middle of the evaluation, and one toward the end of the
9 evaluation.
10 Q. And what did the effort testing that you conducted show?
11 A. All three of the tests that I gave showed that Mr. Hall was
12 putting forth good effort and he was motivated to do his best.
13 THE COURT: That was this year?
14 THE WITNESS: Yes, sir.
15 BY MS. CALLAGHAN:
16 Q. Now, you conducted two IQ tests, correct?
17 A. Yes.
18 Q. We talked a little bit about the WAIS-III that you
19 conducted. What's the other one that you conducted?
20 A. The other one that I conducted is the RIAS, R-I-A-S, which
21 stands for the -- stands for the -- R is for the Reynolds
22 Intelligence Assessment System, the RIAS.
23 Q. And what score did Michael receive on that test?
24 A. An 85 for his full scale IQ.
25 THE COURT: Is that an accepted test to measure IQ?

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1 THE WITNESS: It is accepted. The gold standard, as
2 they say, is the WAIS. And there's others that

have been talked
about here today, the TONI and some of these that are screening
tests that don't even use any language in them. And they're
toward the lower end. I would put the RIAS someplace in between
the gold standard of the WAIS and the ones that are screening
like the Beta and the TONI. That the RIAS correlates .75 with
the WAIS, so they're similar scores. It has -- it's got a
component that's verbal, a component that is not verbal. It has
four subtests. So in my opinion it's not as good as the WAIS
but it's better than the TONI, the Beta, the Shipley, all these
that are screening tests.
THE COURT: Why did you not use the WAIS?
THE WITNESS: I did use the WAIS as well, sir.
THE COURT: So you did both.
THE WITNESS: Yes, sir.
THE COURT: What did you get on the WAIS, what score?
THE WITNESS: The full scale was 85, the verbal was
87, and the performance was 85.
THE COURT: And what did you get on the RIAS?
THE WITNESS: It was an 85 as well.
THE COURT: Okay. Why did you do both?
THE WITNESS: Well, it's a good idea when

you're
24 testing, if you can, if there's enough time and that sort of
25 thing, to use two tests to try to measure the same thing to see

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1 if you get consistency and that sort of thing.
2 THE COURT: Well, has it been your experience that
3 though the WAIS is the gold standard that the RIAS is an
4 accurate way to measure IQ?
5 THE WITNESS: Yes, sir. Like I said, it correlates
6 about .75.
7 THE COURT: What do you mean by that?
8 THE WITNESS: Well, that's a statistical technique
9 that measures the amount of relationship between two sets of
10 scores. If it was a 1.00 it would mean there's a perfect amount
11 of relationship that the lowest score on one test would
12 correspond to the lowest score on the other test. The highest
13 score on test one would also -- and the same person, it would be
14 the highest score on test two. So at .75 is a significantly
15 positive correlation, which means the two are similar.
16 The research on the RIAS tends to show that

scores are a
17 little higher on it than the WAIS, but not significantly so, and
18 not as much of an elevation as you see on the TONI and those
19 other tests that we've heard about.
20 THE COURT: Okay. You said significantly higher?
21 THE WITNESS: No.
22 THE COURT: Or they're not significantly higher.
23 THE WITNESS: Not significantly. That the scores on
24 the RIAS tend to be a little higher, though.
25 THE COURT: Well, let's say you had a WAIS score of 85

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1 and you hadn't given the RIAS and you were trying to predict
2 what the variance would be. What would you predict?
3 THE WITNESS: I would say two to three points higher
4 would be typical, maybe not that much. But a little higher on
5 the RIAS. That's what the research shows.
6 THE COURT: Okay. Go ahead, I'm sorry to interrupt.
7 MS. CALLAGHAN: Thank you, Your Honor.
8 BY MS. CALLAGHAN:
9 Q. So what was your diagnosis of Michael Hall after conducting
10 your evaluation of him in 2008?

A. Well, his intellectual functioning was at the low average,
and considering the standard of error it would be from the
borderline to the low average level of intellectual functioning.
Q. Okay.
THE COURT: What do you mean borderline below average?
THE WITNESS: Well, it's that area between 70 and 85
is the borderline area. So I tested him and he's 85. That's
low average, but there are some error involved as you heard
testimony concerning. And so if you got the low end of the
confidence interval on that score of 85, that would put him at
the high end of the borderline range of intelligence.
THE COURT: What is the high end of the borderline
range?
THE WITNESS: Eighty -- 81, 82.
THE COURT: Okay. And can you explain why he was at

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that level of intelligence this year when he measured at a lower
level of intelligence in the late '90s and early 2000?
THE WITNESS: Well, I don't know the answer. I

think
that there are two opposing or two separate possible
explanations for that. The first one would be, as it was
related to Dr. Cunningham's testimony, the first explanation
would be that the IQ score that I got on Mr. Hall in 2008 was
inflated due to either bias on my part or that Mr. Hall had
become more intelligent in the last eight years. That's one set
of explanations.
On the other end, the other side of that could be that the
IQs that he got in school in '91 and at trial stage were
underestimates due to all the external factors going on in his
life: the emotional turmoil, the chaotic home, the failure in
school, and the resulting problems he had with self-esteem and
with motivation and with effort.
So it's one or the other. It's either that it's
artificially inflated on the one I gave, or it's an
underestimate on the IQ scores obtained when he was in school
and at trial stage.
THE COURT: Well, do you have an opinion as to whether
there was an artificial inflation in yours?
THE WITNESS: Well, no. I don't think that I

was
24 biased. I think that I scored it. I think that I administered
25 it properly. So it's my opinion that it's not an artificial

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1 inflation. As far as his intellect actually increasing over
2 eight years, which would place him at being at that mildly
3 mentally retarded to borderline level at the time of trial and
4 now at the borderline to low average, is that possible? Yes, it
5 is possible that someone's intelligence can improve. People are
6 known to progress from being mildly mentally retarded at a
7 certain age and later not meet that criteria of being mildly
8 mentally retarded. But usually it's because they increase their
9 adaptive behavior skills.
10 THE COURT: Okay. But let's focus only on measured
11 IQ.
12 THE WITNESS: Okay.
13 THE COURT: Do you have an opinion as to whether the
14 measured measurements that have been reported of Michael Hall's
15 IQ in the late '90s and early 2000 is an accurate measurement of

what his IQ actually was at that time?
THE WITNESS: Well, I think it's likely that those are
not accurate, that they are somewhat of an underestimate because
of the external factors, and I don't know about his effort and
his motivation on those tests.
THE COURT: Okay. Go ahead with your questioning.
BY MS. CALLAGHAN:
Q. Why don't you know about his effort and motivation on those
tests?
A. Well, there wasn't any effort and motivation testing

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conducted at any of those prior IQ assessments.
Q. Is it possible that somebody could actually be putting
forth a good effort and still score poorly -- and still do more
poorly than their actual intellect would allow them to do under
other circumstances?
A. Yes. That other factors interfere --
Q. Right.
A. -- with their intelligence testing, yes.
Q. And those factors would be the same things we've been
talking about -- the depression, the abuse, the poor family life
-- those kinds of things.

A. All those things can affect a person's performance on IQ tests.

Q. Would it be the same kind of concept as when you go to take your college entrance exams or SAT? They tell you, make sure you eat a good breakfast, make sure you get a good night's sleep, that kind of thing. Not because you're going to go and put forth less effort, but because you just won't be able to do as well because of those outside factors. Is that your assessment?

A. Yes, that's correct. It happens with any of us on testing or performing in any way. A certain amount of anxiety, as an example, is okay that doesn't interfere. It might even help on some of our performances to be a little anxious. But then it reaches a point at which it begins to interfere. And, of

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course, if it's really severe, it sometimes can prevent the testing altogether.

Q. Is it your opinion that Michael had the kind external factors that would have affected his ability to

score well on
the test at the time of -- let's say at the time of Dr. Cunningham's test?
A. Well, there were some pretty upsetting things that were going on, a lot of uncertainty, anger, emotional turmoil at trial, and it could have.
THE COURT: Let me clarify something. You said that you didn't consider that you had any bias that would have affected the measured intelligence scores when you tested him this year. You've been in the courtroom during Dr. Price's testimony -- I mean, Dr. Cunningham's testimony and you've heard that, haven't you?
THE WITNESS: I have.
THE COURT: He gave an example that he thought indicated a bias on your part, and that is that a question was to be answered in two minutes and you gave him three minutes.
THE WITNESS: Right.
THE COURT: Do you have an explanation, or can you comment on that?
THE WITNESS: Well, you know, it's on that test -- In the first place there was no credit that was given for any items

25 that followed that, so it didn't have an effect on his score at

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1 all. It does say in the manual that you can allow a few seconds
2 if they're close to finishing it. And that item when I allowed
3 60 seconds for him to finish it, even though he got no credit
4 and he got no credit for the one after that, that was probably
5 too long for me to wait. But I felt like at the time that I
6 needed to maintain his rapport with me and his motivation. And
7 he had gotten really involved in it and thought he could do it
8 and I just let him finish it. It didn't have any effect on his
9 score, but I think that 60 seconds was a little too long for me
10 to give him.
11 THE COURT: Well, did it adversely affect the
12 integrity of the score, the 85 score?
13 THE WITNESS: Not at all.
14 THE COURT: Okay. And another example Dr. Cunningham
15 gave of what he perceived to be a bias in your testing practice
16 was that if it was the right answer he would only list -- he
17 would only give one answer. But if it was the wrong answer he

would keep answering. Do you recall that testimony? I may not be describing it the way he said it.

THE WITNESS: Right. Well, I understand what the issue is. It's the ones where he continued to answer. There was not some long pause like he suggested. Those were spontaneous improvements. He was, if you will, thinking out loud. And like the example that he gave, on the orange and the banana, he just said fruit. Well, that's one of the first

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items. It's an easier one. But you go down to another one, for instance, steam and fog. In what way are they alike. And he said they're both from the water cycle and stopped. You go down to fly and tree. Those are both living creatures. You know, there are some of those he just nailed and others he would just start talking.

Here is a good example. Praise and punishment, in what way are they similar. And the first thing he said, well, they both start with P and he laughed. And he then said -- he said

they're like ways of life, and stopped. And, you know, he
didn't get any credit for that. So sometimes he made those
spontaneous improvements and sometimes he didn't. I'm convinced
that it wasn't a bias on my part. It was -- You know, a
spontaneous improvement is a spontaneous improvement.
THE COURT: Is it appropriate for you to record those
spontaneous improvements?
THE WITNESS: Absolutely.
THE COURT: And if the spontaneous improvement becomes
the right answer, so to speak, does he get credit?
THE WITNESS: Yes.
THE COURT: Go ahead.
BY MS. CALLAGHAN:
Q. In fact, Dr. Price, isn't it true that the WAIS manual
specifically says that spontaneous improvements are acceptable?
A. Yes, it does.

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Q. I want to talk to you a little bit about your previous
assessment of Michael Hall. What was your determination with
regard to mental retardation at the trial stage?

A. I was unsure. I testified that I thought it was a clinical judgment call. I couldn't tell. Either he was mildly mentally retarded or he was borderline. I was not -- At trial stage, I was not as convinced as Dr. Cunningham as I'm not as convinced at this time, I guess.

Q. And what's your opinion now?

A. Well, I have the strongest opinion that his current level of intellectual functioning is borderline below average with good effort and motivation and that I have to try to explain what the difference is between the scores and those are the two. Either his IQ has improved or I'm biased or something was going on in his life that interfered with his testing in school and at trial stage.

THE COURT: Which do you think probably is the case?

THE WITNESS: Well, I'm convinced that I wasn't biased, and it's very unlikely that somebody's IQ increases with age. In fact, the data shows, unfortunately, that our IQs, our measured IQs, not our intelligence or wisdom, but our measured IQs tend to decline with age. And it's because of

speed and
some things like that. So I don't think those are as likely.
THE COURT: So you're saying probably the earlier
scores do not accurately reflect his intelligence.

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THE WITNESS: Yes, sir. I think it's fair to present
both sides of that and to explain why I think that. But I'm
convinced I wasn't biased. It's unusual for IQs to increase.
It is possible.
THE COURT: Well, are you saying that with the
knowledge you now have, your opinion that you gave at trial
would have been different if you had --
THE WITNESS: Well, if I had this IQ score with effort
testing of an 85 at trial stage?
THE COURT: Yes.
THE WITNESS: Yes. I would have opined that I did not
think that he was mentally retarded.
THE COURT: Having that knowledge now, do you now
think he was not mentally retarded then?
THE WITNESS: That's correct. I think that that's the
best way to explain what the differences in IQ scores are.
THE COURT: Okay. Go ahead.

MS. CALLAGHAN: Thank you.
BY MS. CALLAGHAN:
Q. I want to talk for a minute about the Flynn Effect. Can you try to explain what the Flynn Effect is?
A. Well, it's a group phenomena on large groups of people on certain IQ tests that shows that their IQs over time increase at the rate of .3 points per year, just like it was testified to earlier. It's not -- I mean, there's a lot of studies on it, on

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certain IQ tests, the Ravens, progressive tests, some of the Weschler tests. It's not held up on all IQ tests. Some of the more recent studies, including on the WAIS-III, that the Flynn Effect has been shown to be a .17 points per year instead of .3.
Q. So when you're talking about that, Dr. Cunningham reduced the score by roughly four points for the Flynn Effect and then another roughly two points for what he refers to as a norming effect.
A. Yes.
Q. So you're saying the .1 versus the .3. You're talking about that four points, right?

A. Excuse me?
Q. When you say that the recent data shows that this increase,
this group increase, is actually closer to .17 than .3, you're
talking about the portion that would correlate to the four
points that Dr. Cunningham is trying to take off of the 85
score, correct?
A. Yes.
Q. Okay.
A. That if you were going to adjust a score on the WAIS-III
that the adjustment would be .17, in my opinion, instead of .3,
if you were going to adjust them.
Q. Do you know of any expert in the scientific community that
has -- Let me rephrase that.
Is it standard practice in the scientific community to

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adjust an individual's score for the Flynn Effect?
A. No.
Q. Can you explain why?
A. Well, it's a group effect. It's on large groups of people.
It's not a standard of practice to take data on the big group of
people and adjust, quantitatively take points off of an
individual's IQ score. It's not known, for

instance, if
8 everybody in the population's IQ would increase over time. It
9 could be some a whole lot and some not at all. So to adjust an
10 individual's score from group data is not a standard of
11 practice.
12 It's a controversial thing. It's not a well-accepted
13 practice. We should be aware of this Flynn Effect and continue
14 to study it. But to shave off points of an individual's IQ is
15 not the standard of practice now.
16 THE COURT: Is there even an uncertainty as to whether
17 there is a Flynn Effect?
18 THE WITNESS: No, sir. There is a Flynn Effect on a
19 lot of IQ tests. This has been shown over and over. It's very
20 -- It's not on all the IQ tests, like I said. There's some that
21 it hasn't shown to hold up. Certainly it's controversial about
22 the cause of it, and is it actually an increase in intelligence
23 in groups of people or is it a quirk of the measurement, which
24 is probably -- I think it's the latter. But the Flynn Effect
25 itself is accepted as a phenomena.

THE COURT: If there is a general increase in intelligence of people, wouldn't that apply to all of the people, including the person being tested?

THE WITNESS: Well, not necessarily. I mean, if you have a group of thousands of people and you measure their IQs and they increase over the years, that is not a sign, or you can't know for sure, that everybody in the population's IQ has decreased. In fact, some of them have likely decreased.

THE COURT: Well, can you ever be sure that any of the so-called increases are real increases as distinguished from a comparison between that test and one that wasn't properly administered before?

THE WITNESS: Well, as to whether or not it's actually an increase in intelligence or is it a measurement? That's controversial. It looks like to me it's a measurement phenomena on groups.

THE COURT: Go ahead. I'm sorry to interrupt.

BY MS. CALLAGHAN:

Q. Are you aware of the report that was recently co-authored by Eric Drogan?

A. I am.

22 Q. And in that report Mr. Drogan -- or Dr. Drogan discussed
23 the fact that there are essentially no practicing professors who
24 teach their students to decrease individual IQ scores, correct?
25 A. That's correct.

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1 Q. Are you aware of any appellate court that has ever ruled
2 that the Flynn Effect is compelling or controlling as a matter
3 of law? And when I say "Flynn Effect," I mean adjusting an
4 individual's IQ score to account for the Flynn Effect.
5 A. And the question is am I aware of any appellate court that
6 has ruled that individual scores should be adjusted?
7 Q. Correct.
8 A. No.
9 Q. Are you aware of a recent case entitled Thomas v.
10 Quarterman out of the Northern District of Texas, Cause No.
11 3:07-CV-39-N?
12 A. I am aware of that case.
13 Q. And how are you aware of that case?
14 A. Well, I have a copy of it that I was provided, and I
15 testified in the case. And they speak to the use of the Flynn

Effect in adjusting an individual's IQ score.
Q. And in that case the Court found that there was reason to
believe --
THE COURT: What relevance does that have?
MS. CALLAGHAN: I'm sorry. What, Your Honor?
THE COURT: What relevance does what that court held
have to this case?
MS. CALLAGHAN: Well, it's a case out of the Northern
District of Texas.
THE COURT: Well, isn't that a legal argument you'll

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make? Let's don't make your legal arguments through the
witness.
MS. CALLAGHAN: Okay.
BY MS. CALLAGHAN:
Q. Have you ever applied the Flynn Effect on any of your
cases?
A. No.
Q. And that would include both cases where you testified as --
or testified as an expert for the state and as an expert for the
defense, correct?
A. That's correct.
Q. I want to go back just a second to talking about whether an

IQ score can increase over time. You started to talk about how
a person's adaptive behaviors can improve over time but that it
was less likely that their IQ score would increase; is that
correct?
A. Yes, that's correct.
Q. If there was going to be an increase in IQ score, what
would you think it would typically be?
A. I think it would be verbal intelligence that would be the
result of educational/cultural experiences.
Q. And how great of an increase would you think would be
possible?
A. You know, I don't know. A few points, perhaps.
Q. One other thing I wanted to clear up. There was discussion

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earlier about a library list.
A. Yes.
Q. Where did you get the library list?
A. I received that from you.
Q. And when did I give that to you?
A. A correctional officer brought it to me at the Polunsky
Unit when I was testing Mr. Hall last month.
Q. And had I given you notice that that was going to be
arriving by fax to the Polunsky Unit?

A. Yes. You told me the day before that you wanted to get that to me, and I was already out of town in Livingston. So you faxed it to me at the prison.
Q. And what was your response when I faxed it to you?
A. Well, it's when you faxed it to me I took it from the guard, but --
Q. When I called you and told you I was faxing it to you, what did you tell me?
A. I said you didn't need to do that, that I didn't care anything about it.
Q. And did you use it at all in making your assessment of Michael?
A. No.
Q. In any way. Did you use it with regard to IQ?
A. No.
Q. Did you use it with regard to adaptive behaviors?

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A. No.
Q. Did you give it to Dr. Cunningham?
A. Yes.
Q. And why did you give it to Dr. Cunningham?
A. Because it was part of my file about this evaluation, and I was turning over everything in the file.
Q. And you gave Dr. Cunningham everything

from your file?

A. Yes.

Q. Did you give Dr. Cunningham your raw test data?

A. Yes.

Q. Did you give me that data?

A. Yes.

MS. CALLAGHAN: I pass the witness, Your Honor.

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